TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].1910.

No. [redacted] 444

THE UNITED STATES, PLAINTIFF IN ERROR,

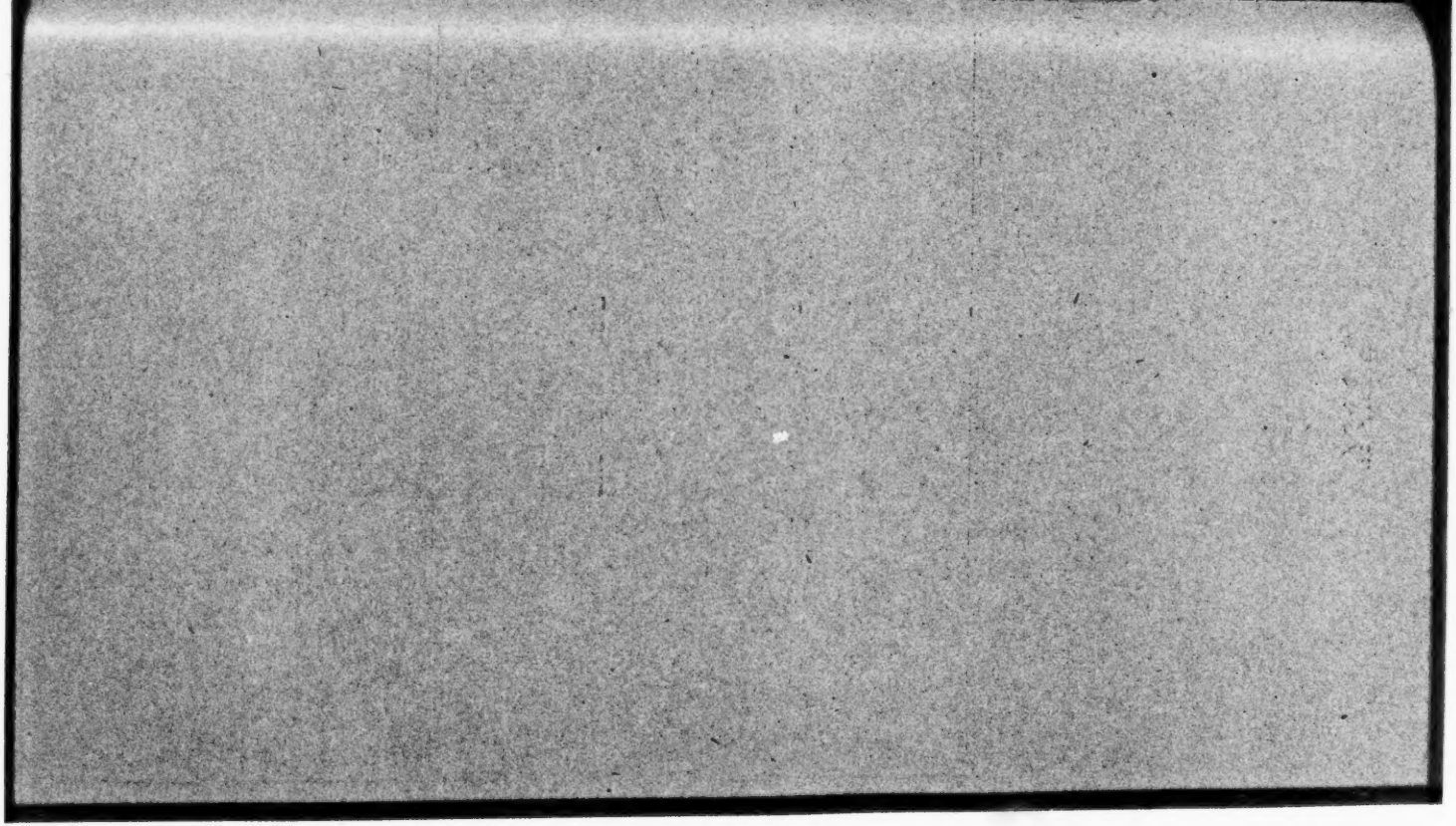
vs.

JAMES T. BARBER, SUMNER G. MOON, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

FILED FEBRUARY 16, 1910.

(22024)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 798.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JAMES T. BARBER, SUMNER G. MOON, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

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1 *Indictment.*

In the district court of the United States, within and for the central division of the district of Idaho.

UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer.	Indictment. Conspiracy to defraud the United States. Violation section 5440, R. S. U. S.

The grand jurors of the United States of America, duly empanelled and sworn in the District Court of the United States for the district of Idaho, and inquiring for said district, in the name and by the authority of the United States of America, upon their oaths do find and present, that James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, and divers other persons whose names are to the grand jurors unknown, in the State and district of Idaho, and within the jurisdiction of this court, heretofore, to-wit, on the first day of September, in the year nineteen hundred and one, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and the day of the presenting and filing of this indictment did unlawfully conspire, combine, confederate, and agree together and with Frank Steunenberg, William Sweet, John Kincaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and divers other persons whose names are to the grand jurors unknown, knowingly, wickedly, falsely, and corruptly to defraud the United States

2 of America out of the possession and use of and title to divers large tracts of timber lands of the United States situate in township six north, ranges four, five, six, seven, and eight east, of the Boise meridian, township seven north, ranges four, five, six, seven, and eight east, of the Boise meridian, and township eight north, range five east, of the Boise meridian, in the county of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, all of which lands were then and there public lands of the United States, by unlawfully, willfully, and corruptly soliciting, inducing, and procuring a large number of persons to apply for and enter said lands under the laws of the United States relating to the purchase and sale of the public timber lands of the United States at the United States land office at the city of Boise, in the State of Idaho, for the use and benefit of said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kincaid, Louis M. Pritchard, John I. Wells, and Patrick Downs, and such other persons and corporations as said last-named persons might thereafter designate upon an understanding and agreement between said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard,

John I. Wells, and Patrick Downs, and said persons so to be solicited, induced, and procured to enter said lands as aforesaid to be had, made, and entered into prior to and at the time of the first application of said persons so to be solicited, induced, and procured as aforesaid to enter said lands that the title to the lands which they, and each of them, would then be applying to enter, and which they might thereafter acquire, should inure to the use and benefit of said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and such other persons or corporations as they might thereafter designate, and upon the further understanding and agreement to be had, made, and entered into between said James T. Barber, Sumner G. Moon, Frank Martin,
Albert E. Palmer, Frank Steunenberg, William Sweet, John
3 Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs,
and said persons so to be solicited, induced, and procured as aforesaid prior to and at the time of the making of their several first applications to enter said lands that the said James T. Barber, Summer G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs would show and point out to and select for said persons so to be solicited, induced, and procured as aforesaid, the lands which they, and each of them, would subsequently apply to enter, and that said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs would furnish said persons so to be solicited, induced, and procured as aforesaid a description of the lands to be applied for by them, and prepare for them the necessary papers to be filed with the United States land office at the city of Boise, in the State of Idaho, in making their first applications to purchase said lands and to represent and defend them in all proceedings before said land office in relation to the entering and purchase of said lands, and with the further understanding and agreement to be had, made, and entered into between said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and said persons so to be solicited, induced, and procured as aforesaid, prior to and at the time of their said first applications to enter said lands, that said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs would, if necessary, furnish said persons, so to be solicited, induced, and procured as aforesaid with the money necessary to make final proof and to purchase said lands from the United States, and prepare all necessary deeds and conveyances to convey the interest and title which said persons so to
be solicited, induced, and procured as aforesaid might there-
4 after acquire to said James T. Barber, Sumner G. Moon, Frank
Martin, Albert E. Palmer, Frank Steunenberg, William Sweet,

John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, or such other persons or corporations as said last-named persons might thereafter designate, and to pay all the expenses attending the execution of such conveyances and the filing and recording of such conveyances.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement and to effect the object thereof, John I. Wells and Patrick Downs, afterwards, to wit, on the twenty-fourth day of September, in the year nineteen hundred and one, in the State and district of Idaho, unlawfully did solicit, induce, and procure Harvey H. Wells, Albert P. Nugent, and Arthur Anderson each to execute and verify by their oaths respectively, before the receiver of the United States land office at Boise, Idaho, a certain paper entitled, "Timber and stone lands sworn statement," and to present and file said papers in said office on said day, said paper so executed, verified, presented, and filed as aforesaid by said Harvey H. Wells, endorsed, in said office, "T. & S. #224," relating to the entry by him, for the unlawful purpose aforesaid, under the laws of the United States relating to the purchase and sale of timber lands of the United States, of the southwest quarter of section fourteen in township seven north, of range five east of the Boise meridian in Boise County, State of Idaho, and said paper so executed, verified, presented and filed as aforesaid by said Albert P. Nugent, endorsed in said office "T. & S. #225," relating to the entry by him, for the unlawful purpose aforesaid, under the laws of the United States relating to the purchase and sale of timber lands of the United States, of the east half of the northeast quarter of section fifteen and the southeast quarter of the southeast quarter of section ten and the southwest quarter of the southwest quarter of section eleven in township seven north, of range five east of the Boise Meridian, in Boise County, State of Idaho, and said paper so executed, verified and presented by said Arthur Anderson, endorsed in said office, "T. & S. #226," relating to the entry by him for the unlawful purpose aforesaid, under the laws of the United States relating to the purchase and sale of timber lands of the United States, of the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north, of range five east of the Boise meridian, in Boise County, State of Idaho.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said John I. Wells and Patrick Downs, afterwards, to wit, on the twenty-fifth day of September, in the year nineteen hundred and one, in the State and district of Idaho, unlawfully did solicit, induce, and procure Abel E. Hunter to execute and verify by his oath before the receiver of the United States land office at Boise, Idaho, and James T. Ball to execute and verify by his oath before

the register of the United States land office at Boise, Idaho, each a certain paper entitled, "Timber and stone land sworn statement," and to present and file said papers in said office on said day, said paper so executed, verified, presented, and filed as aforesaid by said Abel E. Hunter, endorsed in said office "227," relating to the entry by him, for the unlawful purpose aforesaid, under the laws of the United States relating to the purchase and sale of timber lands of the United States, of the southeast quarter of section fourteen in township seven north, of range five east of the Boise meridian in Boise County, State of Idaho, and said paper so executed, verified, presented, and filed by said James T. Ball, endorsed in said
6 office "228," relating to the entry by him, for the unlawful purpose aforesaid, under the laws of the United States relating to the purchase and sale of timber lands of the United States, of the southwest quarter of section thirteen in township seven north, of range five east of the Boise meridian, in Boise County, State of Idaho.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said Frank Steunenberg, William Sweet, John Kinkaid, and John I. Wells afterwards, to wit, on the tenth day of December, in the year nineteen hundred and one, in the State and district of Idaho, did furnish Arthur Anderson, Albert P. Nugent, James T. Ball, Harvey H. Wells, and Abel E. Hunter with money to purchase the lands theretofore applied for by them at the local land office at Boise, Idaho, to be entered under the timber laws of the United States, that is to say, by Arthur Anderson on the twenty-fourth day of September in the year nineteen hundred and one, the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north, of range five east of the Boise meridian, by Albert P. Nugent on the twenty-fourth day of September, in the year nineteen hundred and one, the east half of the northeast quarter of section fifteen and the southeast quarter of the southeast quarter of section ten and the southwest quarter of the southwest quarter of section eleven, in township seven north, of range five east of the Boise meridian, by Harvey H. Wells on the twenty-fourth day of September, in the year nineteen hundred and one, the southwest quarter of section fourteen in township seven north, of range five east of the Boise meridian, by James T. Ball, on the twenty-fifth day of September in the year nineteen hundred and one, the southwest quarter of section thirteen in township seven north, of range five east of the Boise meridian, and by Abel Hunter on the twenty-fifth day of September, in the year nineteen hundred and one, the southeast quarter of section fourteen in township seven north, of range five east of the
7 Boise meridian, all in the county of Boise, State of Idaho, and did solicit, induce, and procure them to make final proof and cash entry of such lands.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof the said James T. Barber and Sumner G. Moon together with one C. W. Lockwood did, on to wit, the ninth day of July in the year nineteen hundred and two, at the city of Eau Claire, in the county of Eau Claire, in the State of Wisconsin, associate themselves together for the purpose of forming and did then form a corporation under the laws of the State of Wisconsin, under the name of the Barber Lumber Company, to engage in, among other things, the business of manufacturing, and to buy, sell, release, exchange, hold and generally deal in all kinds of property, real, personal, and mixed, and to purchase, release, erect, build, construct, alter, maintain, own, and operate sawmills, planing mills, and lumber yards, manufacture and sell timber and all the products of timber, and to engage in lumbering, logging, and other like business; and that on to wit, the thirteenth day of May in the year nineteen hundred and three, the said James T. Barber and Sumner G. Moon filed in the office of the department of state of the State of Idaho, at the city of Boise, in said State, for the purpose of doing said business in said State, a copy of the articles of incorporation of said Barber Lumber Company of Eau Claire, Wisconsin, and otherwise complied with the laws of the State of Idaho for the purpose of obtaining for said corporation the privilege of conducting said business in the State of Idaho.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer did on, to wit, on the
8 thirteenth of January, in the year nineteen hundred and three, in the State and district of Idaho, solicit, induce, and procure Arthur Anderson, James T. Ball, Harvey H. Wells, and Abel E. Hunter, whose applications to enter the following lands situate in the county of Boise and State of Idaho, under the laws of the United States, at the local land office of the United States at Boise, Idaho, namely: By Arthur Anderson, on the twenty-fourth day of September, in the year nineteen hundred and one, the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north of range five east of the Boise meridian; by Harvey H. Wells, on the twenty-fourth day of September, in the year nineteen hundred and one, the southwest quarter of section fourteen in township seven north of range five east of the Boise meridian; by James T. Ball, on the twenty-fifth day of September, in the year nineteen hundred and one, the southwest quarter of section thirteen in township seven north of range five east of the Boise meridian; by Abel E. Hunter, on the twenty-fifth day of September, in the year nineteen hundred and one, the southeast quarter of section fourteen in township seven north of range five east of the Boise

meridian, had been suspended for fraud by the Commissioner of the General Land Office, to apply for a hearing of their cases before the local land office at Boise, Idaho, for the purpose of having said order of suspension removed.

And the grand jurors aforesaid, upon their oath aforesaid, further present that, in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said Frank Martin did on, to wit, the ninth day of December, in the year nineteen hundred and three, appear before the register and receiver of the local land office of the United States at Boise, Idaho, and represent Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter in the hearing had upon that date before the said register and receiver of said office upon the
9 question of the suspension of the entries made by them, respectively, at said office of the lands in the county of Boise and State of Idaho, hereinafter described, under the laws of the United States relating to the entry, purchase, and sale of timber lands, namely: By Arthur Anderson, on the twenty-fourth day of September, nineteen hundred and one, of the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north of range five east of the Boise meridian; by Harvey H. Wells, on the twenty-fourth day of September, in the year nineteen hundred and one, of the southwest quarter of section fourteen in township seven north of range five east of the Boise meridian; by James T. Ball, on the twenty-fifth day of September, in the year nineteen hundred and one, of the southwest quarter of section thirteen in township seven north of range five east of the Boise meridian; by Abel E. Hunter, on the twenty-fifth day of September, in the year nineteen hundred and one, the southeast quarter of section fourteen in township seven north of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said Frank Martin did on, to wit, the seventh day of May, in the year nineteen hundred and four, in the State and district of Idaho, enter an appeal to the Commissioner of the General Land Office on behalf of Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter from the decision of the register and receiver of the local land office of the United States at Boise, Idaho, rendered the ninth day of April, in the year nineteen hundred and four, holding that the several entries theretofore made by them at said office of timber lands in the county of Boise and State of Idaho under the laws of the United States relating to the entry, sale, and purchase of timber lands, namely: By Arthur Anderson, on the twenty-fourth day of September, in the year nineteen hundred and one, of the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north
10 of range five east of the Boise meridian; by Harvey H. Wells, on the twenty-fourth day of September, in the year nineteen

hundred and one, of the southwest quarter of section fourteen in township seven north of range five east of the Boise meridian; by James T. Ball, on the twenty-fifth day of September, in the year nineteen hundred and one, of the southwest quarter of section thirteen in township seven north of range five east of the Boise meridian; by Abel E. Hunter, on the twenty-fifth day of September, in the year nineteen hundred and one, of the southeast quarter of section fourteen in township seven north of range five east of the Boise meridian, were fraudulent in character and should be cancelled.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that, in furtherance, continuance, and renewal of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said Frank Martin, with the conscious knowledge and participation of said James T. Barber, Sumner G. Moon, and Albert E. Palmer, did on, to wit, the thirty-first day of January, in the year nineteen hundred and five, and continuously from day to day, down to the third day of June, in the year nineteen hundred and five, in the State and district of Idaho, prosecute, maintain, and continue an appeal to the Secretary of the Interior of the United States on behalf of said Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter, to obtain the review, reconsideration, and reversal by said Secretary of the decision of the Commissioner of the General Land Office of the United States theretofore rendered, holding the applications of Arthur Anderson, James T. Ball, Harvey H. Wells, and Abel E. Hunter, theretofore made and hereinafter more particularly described, to purchase certain of the above-described lands of the United States in Boise County, State of Idaho, under the laws of the United States relating to the entry, purchase, and sale of timber lands of the United States at the land office at Boise, Idaho, to be false, fraudulent, and fictitious, and directing the cancellation of the same, namely: The application by Arthur Anderson, on the
11 twenty-fourth day of September, in the year nineteen hundred and one, for the east half of the northwest quarter and the west half of the northeast quarter of section fifteen in township seven north of range five east of the Boise meridian; by Harvey H. Wells, on the twenty-fourth day of September, in the year nineteen hundred and one, for the southwest quarter of section fourteen in township seven north of range five east of the Boise meridian; by James T. Ball, on the twenty-fifth day of September, in the year nineteen hundred and one, for the southwest quarter of section thirteen in township seven north of range five east of the Boise meridian; by Abel E. Hunter, on the twenty-fifth day of September, in the year nineteen hundred and one, for the southeast quarter of section fourteen in township seven north of range five east of the Boise meridian, to be false and fraudulent, and directing the cancellation of such entries.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance, continuance, and renewal of said

unlawful conspiracy, confederation, and agreement and to effect the object thereof, said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin did on, to wit, the twenty-eighth day of June, in the year nineteen hundred and five, in the State and district of Idaho, solicit, induce, and procure Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter to execute and file in the United States land office at Boise, Idaho, on said date a waive or relinquishment of their lands theretofore applied to be entered by them at said land office in pursuance of said unlawful conspiracy, confederation, and agreement, under the laws of the United States relating to the purchase and sale of timber lands, that is to say, by Arthur Anderson, on the twenty-fourth day of September in the year nineteen hundred and one, the east half of the northwest quarter and the west half of the northeast quarter of section fifteen, in township seven north, of range five east of the Boise meridian; by Harvey H. Wells, on the twenty-fourth day of September in the year
12 nineteen hundred and one, the southwest quarter of section fourteen, in township seven north, of range five east of the Boise meridian; by James T. Ball, on the twenty-fifth day of September in the year nineteen hundred and one, the southwest quarter of section thirteen, in township seven north, of range five east of the Boise meridian; by Abel E. Hunter, on the twenty-fifth day of September in the year of nineteen hundred and one, the southeast quarter of section fourteen, in township seven north, of range five east of the Boise meridian.

And the grand jury aforesaid, upon their oaths afore-said, do further present that, in furtherance, continuance of said unlawful conspiracy, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin did on, to wit, the nineteenth day of September, in the year nineteen hundred and five, in the State and district of Idaho, unlawfully induce Mary J. Martin, Nettie We-ston, Eleanor A. Phelps, and Leon S. Simpson to make application to the United States land office at Boise, Idaho, and execute and file therein on said date the preliminary written statement or affidavit required by law for the purchase of certain of the aforesaid lands in Boise County, Idaho, to wit, the lands theretofore applied to be purchased in pursuance of said unlawful combination, conspiracy, and agreement by Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter, whose entries had been cancelled by the Department of the Interior of the United States for fraud, that is to say, by Leon S. Simpson, timber and stone lands sworn statement number 1582, for the east half of the northwest quarter and the west half of the northwest quarter of section fifteen, in township seven north, of range five east of the Boise meridian; by Eleanor A. Phelps, timber and stone lands sworn statement number 1853, for the southwest quarter of section thirteen, in township seven north, of range five east of the Boise meridian; by Mary J. Martin, timber and stone sworn statement No. 1584, for the south-

west quarter of section fourteen, in township seven north, of
13 range five east of the Boise meridian; by Nettie Weston, timber and stone sworn statement number 1585, for the purchase of the southeast quarter of section fourteen, in township seven north, of range five east of the Boise meridian.

Contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against the peace and dignity of the said United States.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin on, to wit, the twentieth day of April, in the year nineteen hundred and five, in the State and district of Idaho, and within the jurisdiction of this court, unlawfully did conspire, combine, confederate, and agree together, and with divers other persons to the grand jurors unknown, knowingly, wickedly, and corruptly to defraud the United States out of the possession and use of and the title to divers large tracts of public timber lands of the United States, of great value, situate in the county of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, which lands are more particularly described as follows, namely: The east half of the northwest quarter and the west half of the northeast quarter of section fifteen, in township seven north, of range five east of the Boise meridian; the southwest quarter of section fourteen, in township seven north, of range five east of the Boise meridian; the southwest quarter of section thirteen, in township seven north, of range five east of the Boise meridian; and the southeast quarter of section fourteen, in township seven north, of range five east of the Boise meridian, in the county of Boise, in the State of Idaho, and with the intent and purpose on the part of said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin unlawfully to acquire the possession and use of
14 and title to said lands for the use, benefit, and profit of themselves and the Barber Lumber Company, a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, under and pursuant to the laws of said State, with an office and agent at the city of Boise in said State.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that thereafter, in furtherance and continuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin, on, to wit, the twentieth day of April, in the year nineteen hundred and five, did prosecute, maintain, and continue an appeal to the Secretary of the Interior on behalf of Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter, from a decision of the Commissioner of the General Land Office of the United States theretofore rendered,

holding the several applications of said Arthur Anderson, Harvey H. Wells, James T. Ball, and Abel E. Hunter to purchase the lands hereinbefore in this court described under the laws of the United States relating to the purchase and sale of the public timber lands of the United States, which applications were made, presented, and filed at the land office of the United States at the city of Boise, in the State of Idaho, on, to wit, the twenty-fourth and twenty-fifth days, respectively, of September, in the year nineteen hundred and one, were false and fraudulent, and directing the cancellation thereof, for the purpose of obtaining a review, reconsideration, and reversal of said decision.

Contrary to the form, force, and effect of the statute of the United States of America in such case made and provided and against the peace and dignity of the said United States.

15 THIRD COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, Frank Martin on, to wit, the nineteenth day of September, in the year nineteen hundred and five, in the district and State of Idaho, and within the jurisdiction of this court, unlawfully did conspire, combine, confederate, and agree together and with divers other persons, to the grand jurors unknown, knowingly, wickedly, and corruptly to defraud the United States out of the possession and use of and title to divers large tracts of public timber lands of the United States, of great value, situate in the county of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, and within the jurisdiction of this court, all of which lands were then and there public lands of the United States open to entry and purchase under the laws of the United States pertaining to public timber lands of the United States, at the land office of the United States at Boise, Idaho, in the State of Idaho, in the manner and by means of the false, fraudulent, and unlawful understandings, agreements, and practices described and set forth in the first count of this indictment, the lands referred to being more specifically described as follows: The east half of the northwest quarter and the west half of the northeast quarter of section fifteen, in township seven north, of range five east of the Boise meridian; the southwest quarter of section thirteen, in township seven north, of range five east of the Boise meridian; the southwest quarter of section fourteen, in township seven north, of range five east of the Boise meridian; and the southeast quarter of section fourteen, in township seven north, of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in furtherance and continuance of said unlawful conspiracy, combination, confederation, and agreement, and
16 to effect the object thereof, the said Frank Martin, afterwards, to wit, on the nineteenth day of September, in the year nine-

teen hundred and five, at the city of Boise, in the State of Idaho, unlawfully did persuade, induce, solicit, procure, and cause Leon S. Simpson on said date to make and file in the United States land office at Boise, in the State of Idaho, a "timber and stone lands sworn statement," numbered 1582, in said land office, and make application to enter and purchase said timber lands of the United States, situate in the county of Boise, in the State of Idaho, described more particularly as follows: The east half of the northwest quarter and the west half of the northeast quarter of section fifteen, in township seven north, of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance and continuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Frank Martin afterwards, to wit, on the nineteenth day of September, in the year nineteen hundred and five, at the city of Boise, in the State of Idaho, unlawfully did persuade, induce, solicit, procure, and cause Eleanor A. Phelps on said date to make and file in the United States land office at Boise, in the State of Idaho, a "timber and stone lands sworn statement," numbered 1583, in said land office, and make application to enter and purchase said timber lands of the United States, situate in the county of Boise, in the State of Idaho, described more particularly as follows: The southwest quarter of section thirteen, in township seven north, of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance and continuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Frank Martin afterwards, to wit, on the nineteenth day of September, in the year nineteen hundred and
17 five, at the city of Boise, in the State of Idaho, *in* unlawfully did persuade, induce, solicit, procure, and cause Mary J. Martin on said date to make and file in the United States land office at Boise, in the State of Idaho, a "timber and stone lands sworn statement," numbered 1584, in said land office, and make application to enter and purchase said timber lands of the United States, situate in the county of Boise, in the State of Idaho, described more particularly as follows: The southwest quarter of section fourteen, in township seven north, of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance and continuance of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Frank Martin afterwards, to wit, on the nineteenth day of September, in the year nineteen hundred and five, at the city of Boise, in the State of Idaho, unlawfully did persuade, induce, solicit, procure, and cause Nettie Weston on said date to make and file in the United States land office in the State of Idaho, a "timber and stone lands sworn statement," numbered 1585, in said land office, and make application to enter and purchase said timber lands of the United States, situate in the county of Boise, in the State of

Idaho, described more particularly as follows: The southeast quarter of section fourteen, in township seven north, of range five east of the Boise meridian.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that, in furtherance and pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the twelfth day of January, in the year nineteen hundred and six, at the city of Boise, in the State of Idaho, did cause and induce the said Nettie Weston to make a deed conveying to him, the said Frank Martin, in fee simple, all the right, title, and
18 interest of her, the said Nettie Weston, in and to the said timber land in the county of Boise, in the State of Idaho, for which the said Nettie Weston had made and filed the said timber and stone lands sworn statement No. 1585, and entry and application to purchase at the United States land office at Boise, in the State of Idaho, and more particularly hereinbefore described in this count of the indictment.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the thirteenth day of January, in the year nineteen hundred and six, at the city of Boise, in the State of Idaho, did cause and induce the said Eleanor A. Phelps to make a deed conveying to him, the said Frank Martin, in fee simple, all the right, title, and interest of her, the said Eleanor A. Phelps, in and to the said timber land in the county of Boise, in the State of Idaho, for which the said Eleanor A. Phelps had made and filed the said timber and stone lands sworn statement, numbered 1583, and entry and application to purchase at the United States land office at the city of Boise, in the State of Idaho, and more particularly hereinbefore described in this count of the indictment.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the sixteenth day of June, in the year nineteen hundred and six, did appear at the United States land office at the city of Boise, in the State of Idaho, and demand of and receive from the register of said United States land office the patent issued by the United States to the said Nettie Weston, numbered 3440, and the
19 patent issued by the United States to Eleanor A. Phelps, numbered 3442, for the timber lands in the county of Boise, in the State of Idaho, for which the said Nettie Weston and Eleanor A. Phelps had each made and filed a timber and stone lands sworn statement and entry and application to purchase at the United States land office at the city of Boise, in the State of Idaho, and hereinbefore in this count of the indictment more particularly described.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the sixteenth day of June, in the year nineteen hundred and six, did appear at the United States land office at the city of Boise, in the State of Idaho, and demand and receive from the register of said United States land office the patent issued by the United States to the said Mary J. Martin, numbered 3443, for the timber lands in the county of Boise, in the State of Idaho, for which the said Mary J. Martin had made and filed a timber and stone lands sworn statement and entry and application to purchase at the United States land office at the city of Boise, in the State of Idaho, and hereinbefore in this count of the indictment more particularly described.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement, aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the twenty-fourth day of August, in the year nineteen hundred and six, did at the city of Boise, in the State of Idaho, cause and induce the said Leon S. Simpson to make and sign a deed conveying to him, the said Frank Martin, in fee simple, all the right, title, and interest of him, the said Leon S. Simpson, in and to the said timber land in the county of Boise, in the State of Idaho, for
20 which the said Leon S. Simpson had made and filed a timber and stone lands sworn statement, numbered 1582, and entry and application to purchase at the United States land office at the city of Boise, in the State of Idaho, and hereinbefore more particularly in this count of the indictment described.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say, that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards, to wit, on the twenty-eighth day of September, in the year nineteen hundred and six, did, at the city of Boise, in the State of Idaho, cause and induce the said Mary J. Martin to make a deed conveying to him the said Frank Martin, in fee simple, all the right, title, and interest of her, the said Mary J. Martin, in and to the said timber land in the county of Boise, in the State of Idaho, for which the said Mary J. Martin had made and filed a timber and stone lands sworn statement, numbered 1584, and entry and application to purchase at the United States land office at the city of Boise, in the State of Idaho, and more particularly in this count of the indictment described.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present and say, that further in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and to effect the object of the same, the said Frank Martin afterwards,

to wit, on the seventh day of November, in the year nineteen hundred and six, at the city of Boise, in the State of Idaho, did then and there, by a deed made, executed, and delivered, convey in fee simple to the Barber Lumber Company, a corporation, organized under the laws of the State of Wisconsin, and doing business and with offices in the State of Idaho, the title and interest of him, the said Frank Martin, in and to the timber land situate in the county of
21 Boise, in the State of Idaho, which he had previously acquired title to by deeds from Nettie We-ton, Eleanor A. Phelps, Leon S. Simpson, and Mary J. Martin, and more particularly described as the southwest quarter of section fourteen, the southwest quarter of section thirteen, the southeast quarter of section fourteen, the east half of the northwest quarter and the west half of the northeast quarter of section fifteen, all in township seven north of range five east of the Boise meridian, containing six hundred and forty acres according to the government survey thereof:

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided.

FOURTH COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin, in the State and district of Idaho, and within the jurisdiction of this court, heretofore, to wit, on the first day of September, in the year nineteen hundred and one, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and the day of the presenting and filing of this indictment, did unlawfully con-pire, combine, confederate, and agree together and with Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and divers other persons whose names are to the grand jurors unknown, knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States situate in township six
22 north, ranges four, five, six, seven, and eight east of the Boise meridian, town-hip seven north, ranges four, five, six, seven, and eight east of the Boise meridian, and township eight north, range five east of the Boise meridian, in the county of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, all of which lands were then and there public lands of the United States, with the intent and purpose unlawfully to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be organized, and organized, to wit, the Barber Lumber Company, a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, with an office and agent at the city of Boise in said State,

and ultimately to obtain the transfer of the title to said lands to said corporation, by unlawfully, wilfully, and corruptly soliciting, inducing, and procuring a large number of persons to apply for and enter said lands under the laws of the United States relating to the purchase and sale of the public timber lands of the United States, at the United States land office at the city of Boise, in the State of Idaho, for the use and benefit of said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs, and said corporation, upon an understanding and agreement between said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs, and said persons so to be solicited, induced, and procured to enter said lands as aforesaid, which agreement was to be had, made, and entered into prior to and at the time of the first application to enter said lands of said persons so to be solicited, induced, and procured as aforesaid, that the title to the lands that they, and each of them, would then be applying to enter, and which they might thereafter acquire, should inure to the use and benefit of said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John
23 I. Wells, Patrick Downs, and said corporation, and upon the further understanding and agreement to be had, made, and entered into between said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and said persons so to be solicited, induced, and procured as aforesaid prior to and at the time of the making of their several first applications to enter said lands that the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs would show and point out to and select for said persons so to be solicited, induced, and procured as aforesaid the lands which they, and each of them, would subsequently apply to enter, and that the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs would furnish said persons so to be solicited, induced, and procured as aforesaid a description of the lands to be applied for by them, and prepare for them the necessary papers to be filed with the United States land office at the city of Boise, in the State of Idaho, in making their first application to purchase said lands, and to represent and defend them in all proceedings before said land office in relation to the entering and purchase of said lands, and with the further understanding and agreement to be had, made, and entered into between said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis

M. Pritchard, John I. Wells, Patrick Downs, and said persons so to be solicited, induced, and procured as aforesaid, prior to and at the time of their said first applications to enter said lands, that the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs would, if necessary, furnish said persons so to be solicited, induced, and procured as afore-
24 said with the money necessary to make final proof and to purchase said lands from the United States, and prepare all necessary deeds and conveyances to convey the interest and title which said persons so to be solicited, induced, and procured as aforesaid might thereafter acquire to said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and said corporation and such other persons as they might thereafter designate for the use and benefit of said corporation, and to pay all the expenses attending the execution of such conveyances and the filing and recording of such conveyances.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that thereafter in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs did unlawfully solicit, induce, and procure the following persons, namely: John J. Keane, Roy Dye, Henry T. James, John I. Wells, Samuel Dye, Oral Dye, Kate Hunter, Dean West, Louisa B. West, William Pearson, Margaret Pearson, Lelia Lee, Arthur E. Brookhart, Gustav A. Link, Mary Link, Harry L. Clyne, Louis Nibler, Edward Brisbin, William W. Abrams, Lewis K. Burns, Lewis L. Folsom, Walter L. Harrison, James O. Baker, Charles W. Balentine, Norman H. Young, Lettie L. Stephenson, Martin S. Stephenson, Charles N. Arbuckle, Susan N. Arbuckle, Altha Gillum, Mack Gillum, Samuel Greig, Sarah Greig, Patrick H. Downs, Albert B. Ewing, William H. Martin, Henrietta B. Martin, Ery A. Wilmot, Edward E. Butler, Wilbert F. Wilmot, Louis M. Pritchard, Louise E. Butler, Elvie M. Butler, General L. Willhite, Senora A. Joplin, Andrew F. Joplin, Walter Joplin, William E. Cavanaugh, William H. Gibberd, Addie G. Gibberd, Willis A. Ross, Josie M. Ross, Clara M. Snow, George E. Eagleson, Mary J. Eagleson, Alexander T. Ellis, Joseph Ehrmanntrant, Margaret M. Ehrmann-
25 trant, George R. Avery, Frank R. Martin, Wheeler H. Martin, Thomas L. Martin, Rice J. Harbaugh, Margaret Scully, Abbie M. Briggs, George G. Gibson, Uriah F. McBurney, Clifton C. Bliven, and Thomas F. Kelley, to make application to the United States land office at the city of Boise in the State of Idaho, to purchase certain portions of the land hereinbefore in this count described under the laws of the United States relating to the purchase and sale of the public timber lands of the United States, and to execute and

verify before the proper officers of said land office the preliminary affidavits or sworn statements required by law to be made, executed, and filed in said office by persons applying to purchase said lands under said laws, said lands and said preliminary affidavits or sworn statements being hereinafter in this count more particularly set forth and described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter on the dates of the making of the final proof of the several persons hereinafter referred to, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs did unlawfully solicit, induce, and procure the following persons, namely: John J. Keane, Roy Dye, Henry T. James, John I. Wells, Samuel Dye, Oral Dye, Kate Hunter, Dean West, Louisa B. West, William Pearson, Margaret Pearson, Lelia Lee, Arthur E. Brookhart, Gustav A. Link, Mary Link, Harry L. Clyne, Louis Nibler, Edward Brisbin, William W. Abrams, Lewis K. Burns, Lewis L. Folsom, Walter L. Harrison, James O. Baker, Charles W. Balentine, Norman H. Young, Lettie L. Stephenson, Martin S. Stephenson, Charles N. Arbuckle, Susan N. Arbuckle, Altha Gillum, Mack Gillum, Samuel Greig, Sarah Greig, Patrick H. Downs, Albert B. Ewing, William H. Martin, Henrietta S.
26 Martin, Ery A. Wilmot, Edward E. Butler, Wilbert F. Wilmot, Louis M. Pritchard, Louise E. Butler, Elvie M. Butler, General L. Willhite, Senora A. Joplin, Andrew F. Joplin, Walter Joplin, William E. Cavanaugh, William H. Gibberd, Willis A. Ross, Josie M. Ross, Clara M. Snow, George E. Eagleson, Mary J. Eagleson, Alexander T. Ellis, Joseph Ehrmanntrant, Margaret M. Ehrmanntrant, George R. Avery, Frank R. Martin, Wheeler H. Martin, Thomas L. Martin, Rice J. Harbaugh, Margaret Scully, Abbie M. Briggs, George G. Gibson, Uriah F. McBurney, Clifton C. Bliven, and Thomas F. Kelly to make final proof at the United States land office at the city of Boise in the State of Idaho, upon certain of the lands above described theretofore entered by them at said land office, and to pay the purchase price thereof to the United States, which lands and the dates of the said final proof and payment of said purchase price, otherwise termed cash entry, are hereinafter in this court more particularly set forth and described.

The following is the official number of the verified preliminary written statements or affidavits filed by the persons in this count hereinbefore named, the dates of the filing thereof in the United States land office at the city of Boise in the State of Idaho and of making the final proof therefor and a description of the lands described therein, respectively, all of said descriptions having reference to the Boise meridian and all of said lands being situate within the Boise, Idaho, land district, in the county of Boise in the State of Idaho, to wit:

John J. Keane, No. 249; date of filing, October 26, 1901; cash entry No. 1813; date of final proof, January 16, 1902. W. half NE. quarter, W. ½ of the SE. ¼ sec. 21, T. 7 N., R. 5 E., B. M.

Roy Dye, No. 370; date of filing, April 29, 1902; cash entry No. 1939; date of final proof, July 18, 1902. SE. ¼ sec. 15, T. 7 N., R. 5 E., B. M.

Henry T. James, No. 383; date of filing, May 5, 1902; cash entry No. 1966; date of final proof, July 24, 1902. SE. ¼ sec. 13, T. 7 N., R. 5 E., B. M.

John I. Wells, No. 219; date of filing, September 20, 1901; cash entry No. 3025; date of final proof, December 12, 1901. NW. ¼ sec. 14, T. 7 N., R. 5 E., B. M.

Samuel Dye, No. 247; date of filing, October 26, 1901; date of final proof, January 16, 1902. S. ½ SE. ¼ sec. 27, S. ½ SW. ¼ sec. 26, T. 7 N., R. 5 E., B. M.

Oral Dye, No. 250; October 26, 1901; date of final proof, January 16, 1902. Lot 1, SE. ¼ NE. ¼, NE. ¼ SE. ¼, sec. 5, NW. ¼ SW. ¼, sec. 4, T. 7 N., R. 5 E., B. M.

Kate Hunter, No. 237; October 5, 1901; cash entry No. 2021; final proof, December 19, 1901. S. W. ¼ sec. 15, T. 7 N., R. 5 E., B. M.

Louisa B. West, No. 262; November 1, 1901; cash entry No. 1940; final proof, January 29, 1902. NW. ¼ sec. 23, T. 7 N., R. 5 E., B. M.

William Pearson, No. 276; November 26, 1901; cash entry No. 1886; final proof, February 13, 1902. NE. ¼ sec. 12, T. 7 N., R. 5 E., B. M.

Margaret Pearson, No. 289; December 7, 1901; cash entry No. 1879; final proof, February 21, 1902. N. ½ NW. ¼, NW. ¼ NE. ¼, sec. 27, SE. ¼ SW. ¼, sec. 22, T. 7 N., R. 5 E., B. M.

Lelia Lee, No. 294; December 19, 1901; cash entry No. 1946; final proof, March 6, 1902. SE. ¼ sec. 1, T. 7 N., R. 5 E., B. M.

Arthur E. Brookhart, No. 320; January 14, 1902; cash entry No. 2050; final proof, April 8, 1902. SW. ¼ sec. 35, T. 7 N., R. 5 E., B. M.

Gustav A. Link, No. 263; November 1, 1901; cash entry No. 1957; final proof, January 29, 1902. SW. ¼ sec. 24, T. 7 N., R. 5 E., B. M.

Mary Link, No. 264; November 1, 1901; cash entry No. 2022; final proof, January 29, 1902. N. ½ SE. ¼ sec. 22, N. ½ SW. ¼ sec. 23, T. 7 N., R. 5 E., B. M.

Harry L. Clyne, No. 259; October 31, 1901; cash entry No. 2025; final proof, January 24, 1902. SE. ¼ sec. 6, T. 7 N., R. 5 E., B. M.

Louis Nibler, No. 261; November 1, 1901; cash entry No. 2012; final proof, January 28, 1902. SE. ¼ sec. 23, T. 7 N., R. 5 E., B. M.

Edward Brisbin, No. 360; April 18, 1902; cash entry No. 1904; final proof, July 9, 1902. Lot 3, SE. ¼ NE. ¼, N. ½ SW. ¼, sec. 1, T. 7 N., R. 5 E., B. M.

William W. Abrams, No. 258; October 30, 1901; cash entry No. 1922; final proof, January 22, 1902. Lots 3, 4, sec. 5, T. 7 N., R. 5 E., S. ½ SW. ¼ sec. 32, T. 8 N., R. 5 E., B. M.

Lewis K. Burns, No. 278; November 26, 1902; cash entry No. 1891; final proof, February 14, 1902. NW. ¼ sec. 24, T. 7 N., R. 5 E., B. M.

Lewis L. Folsom, No. 257; October 30, 1901; cash entry No. 1974; final proof, January 22, 1902. NE. ¼ NW. ¼ sec. 18, SE.¼ NW. ¼, E. ½ SW. ¼ sec. 7, T. 7 N., R. 5 E., B. M.

28 James O. Baker, No. 306; December 24, 1901; cash entry No. 1958; final proof, March 20, 1902. SE. ¼ sec. 25, T. 7 N., R. 5 E., B. M.

Charles W. Ballentine, No. 256; October 29, 1901; cash entry No. 2466; final proof, January 22, 1901. NE. ¼ sec. 7, T. 7 N., R. 5 E., B. M.

Norman H. Young, No. 321; January 22, 1902; cash entry No. 1931; final proof, April 14, 1902. S. ½ NW. ¼ sec. 17, SE. ¼ NE. ¼, NE. ¼ SE. ¼ sec. 18, T. 7 N., R. 5 E., B. M.

Lettie L. Stephenson, No. 304; December 24, 1901; cash entry No. 1944; final proof, March 13, 1902. SE. ¼ sec. 34, T. 7 N., R. 5 E., B. M.

Martin S. Stephenson, No. 305; December 24, 1901; cash entry No. 1945; final proof, March 14, 1902. E. ½ NE. ¼ sec. 33, W. ½ NW. ¼ sec. 34, T. 7 N., R. 5 E., B. M.

Charles N. Arbuckle, No. 376; May 3, 1902; cash entry No. 1967; final proof, July 24, 1902. SW. ¼ NE. ¼, W. ½ SE. ¼ sec. 27, NW. ¼ NE. ¼ sec. 34, T. 8 N., R. 5 E., B. M.

Susan N. Arbuckle, No. 378; May 3, 1902; cash entry No. 1968; final proof, July 24, 1902. S. ½ SE. ¼, NW. ¼ SE. ¼, SW. ¼ NE. ¼ sec. 19, T. 7 N., R. 5 E., B. M.

Altha Gillum, No. 313; December 26, 1901; cash entry No. 1941; final proof, March 27, 1902. S. ½ NW. ¼, S. ½ NW. ¼ sec. 25, T. 8 N., R. 5 E., B. M.

Mack Gillum, No. 312; December 26, 1901; cash entry No. 1983; final proof, March 18, 1902. NE. ¼ sec. 26, T. 8 N., R. 5 E., B. M.

Samuel Greig, No. 287; December 7, 1901; cash entry No. 1895; final proof, February 21, 1902. Lot 4, sec. 1, lots 1, 2, 3, sec. 2, T. 7 N., R. 5 E., B. M.

Sarah Greig, No. 288; December 7, 1901; cash entry No. 1896; final proof, February 21, 1902. S ½ NW. ¼, S. ½ NE. ¼ sec. 2, T. 7 N., R. 5 E., B. M.

Patrick H. Downs, No. 204; August 17, 1901; cash entry No. 1977; final proof, November 13, 1901. N. ½ NE. ¼, N. ½ NW. ¼ sec. 17, T. 7 N., R. 5 E., B. M.

Albert B. Ewing, No. 496; August 11, 1902; cash entry No. 2153; final proof, November 7, 1902. Lots 3, 4, E. ½ SW. ¼ sec. 7, T. 7 N., R. 5 E., B. M.

William H. Martin, No. 637; September 29, 1902; cash entry No. 2347; final proof, March 18, 1903. SE. ¼ sec. 7, T. 7 N., R. 8 E., B. M.

Henrietta B. Martin, No. 636; September 29, 1902; cash entry No. 2346; final proof, March 13, 1903. E. ½ NW. ¼ lots 1, 2, sec. 7, T. 7 N., R. 8 E., B. M.

29 Ery A. Wilmot, No. 332; March 22, 1902; cash entry No. 1836; final proof, June 12, 1902. NW. ¼ sec. 17, T. 6. N., R. 6 E., B. M.

Edward E. Butler, No. 348; March 28, 1902; cash entry No. 1888; final proof, June 24, 1902. SE. ¼ sec. 32, T. 6 N., R. 6 E., B. M.

Wilbert F. Wilmot, No. 308; December 26, 1901; cash entry No. 1943; final proof, July 18, 1902. Lots 3, 4, 5, SE. ¼ NW. ¼ sec. 6, T. 7 N., R. 6 E., B. M.

Elvie M. Butler, No. 582; September 15, 1902; cash entry No. 2255; final proof, January 8, 1903. Lot 4, SW. ¼ NW. ¼, W. ½ SW. ¼ sec. 2, T. 7 N., R. 8 E., B. M.

General L. Willhite, No. 625; Sept. 24, 1902; cash entry No. 2281; final proof, Jan. 27, 1903. SW. ¼ sec. 32, T. 7 N., R. 8 E., B. M.

Sonora A. Joplin, No. 645; Oct. 2, 1902; cash entry No. 2350; final proof, March 19, 1903. SW. ¼ sec. 33, T. 7 N., R. 8 E., B. M.

Andrew F. Joplin, No. 644; Oct. 2, 1902; cash entry No. 2351; final proof, March 19, 1903. Lots 1, 2, 3, 4 sec. 5, T. 6 N., R. 8 E., B. M.

Walter Joplin, No. 613; Sept. 23, 1902; cash entry No. 2405; final proof, May 4, 1903; W. ½ NE. ¼, SE. ¼ NE. ¼, NE. ¼ SE. ¼ sec. 20, T. 7 N., R. 8 E., B. M.

William E. Cavanaugh, No. 550; Sept. 14, 1902; cash entry No. 2245; final proof, Dec. 26, 1902; N. ½ NW. ¼, N. ½ NE. ¼ sec. 15, T. 7 N., R. 8 E., B. M.

William H. Gibberd, No. 527; Aug. 29, 1902; cash entry No. 2187; final proof, Dec. 3, 1902. E. ½ NW. ¼, SW. ¼ NW. ¼, NE. ¼ SW. ¼ sec. 12, T. 7 N., R. 7 E., B. M.

Addie G. Gibberd, No. 503; Sept. 8, 1902; cash entry No. 2238; final proof, Dec. 23, 1902. Lots 3, 4, S. ½ NW. ¼ sec. 2, T. 7. N., R. 7 E., B. M.

Willis A. Ross, No. 1055; Sept. 14, 1903; cash entry No. 2797; final proof, Dec. 23, 1903. SE. ¼ sec. 20, T. 6 N., R. 4 E., B. M.

Josie M. Ross, No. 1056; Sept. 14, 1903; cash entry No. 2798; final proof, Dec. 23, 1903. SW. ¼ sec. 20, T. 6 N., R. 4 E., B. M.

Clara M. Snow, No. 1059; Sept. 14, 1903; cash entry No. 2861; final proof, Dec. 24, 1903. NE. ¼ sec. 15, T. 6 N., R. 4 E., B. M.

George E. Eagleson, No. 1036; Sept. 14, 1903; cash entry No. 2765; final proof, Dec. 11, 1903. E. ½ NE. ¼, E. ½ SE. ¼ sec. 27, T. 6 N., R. 4 E., B. M.

Mary J. Eagleson, No. 1037; Sept. 14, 1903; cash entry No. 2766; final proof, Dec. 11, 1903. Lot 2, SW. ¼ NE. ¼, W. ½ SE. ¼ sec. 1, T. 6 N., R. 4 E., B. M.

30 Alexander T. Ellis, No. 1048; September 14, 1903; cash entry No. 2770; final proof, Dec. 11, 1903. N. ½ NW. ¼, W. ½ NE. ¼ sec. 22, T. 6 N., R. 4 E., B. M.

Joseph Ehrmanntrant, No. 1051; Sept. 14, 1903; cash entry No. 2775; final proof, Dec. 15, 1903. NW. ¼ sec. 15, T. 6 N., R. 4 E., B. M.

Margaret M. Ehrmanntrant, No. 1057; Sept. 14, 1903; cash entry No. 2776; final proof, Dec. 15, 1903. SE. ¼ sec. 15, T. 6 N., R. 4 E., B. M.

George R. Avery, No. 1052; Sept. 14, 1903; cash entry No. 2781; final proof, Dec. 12, 1903. SE. ¼ sec. 29, T. 6 N., R. 4 E., B. M.

Frank R. Martin, No. 1050; Sept. 14, 1903; cash entry No. 2777; final proof, Dec. 15, 1903. NE. ¼ sec. 21, T. 6 N., R. 4 E., B. M.

Wheeler H. Martin, No. 1038; Sept. 14, 1903; cash entry No. 2930; final proof, March 9, 1904. SE. ¼ sec. 21, T. 6 N., R. 4 E., B. M.

Thomas L. Martin, No. 1039; Sept. 14, 1903; cash entry No. 2769; final proof, Dec. 11, 1903. SW. ¼ sec. 23, T. 6 N., R. 4 E., B. M.

Rice J. Harbaugh, No. 1062; Sept. 14, 1903; cash entry No. 2754; final proof, Dec. 7, 1903. S. ½ SW. ¼, NW. ¼ SW. ¼, SW. ¼ NW. ¼ sec. 22, T. 6 N., R. 4 E., B. M.

Margaret Scully, No. 1035; Sept. 14, 1903; cash entry No. 2763; final proof, Dec. 10, 1903. NW. ¼ sec. 20, T. 6 N., R. 4 E., B. M.

Abbie M. Briggs, No. 1342; June 8, 1904; cash entry No. 3129; final proof, Sept. 20, 1904. SW. ¼ NE. ¼, NW. ¼ SE. ¼, SW. ¼ SE. ¼, NE. ¼ SE. ¼ sec. 5, T. 6 N., R. 4 E., B. M.

George G. Gibson, No. 335; March 25, 1902; cash entry No. 1870; final proof, June 17, 1902. NW. ¼ sec. 21, T. 6 N., R. 6 E., B. M.

Uriah F. McBurney, No. 303; Dec. 23, 1901; cash entry No. 1989; final proof, March 13, 1902. SE. ¼ sec. 11, T. 7 N., R. 5 E., B. M.

Clifton C. Bliven, No. 594; Sept. 16, 1902; cash entry No. 2401; final proof, April 29, 1903. E. ½ NE. ¼, N. ½ SE. ¼ sec. 24, T. 7 N., R. 7 E., B. M.

Thomas F. Kelly, No. 549; Sept. 4, 1902; cash entry No. 2217; final proof, December 17, 1902. SW. ¼ sec. 10, T. 7 N., R. 8 E., B. M.

Dean West, No. 248; October 26, 1901; cash entry No. 1903; final proof, January 16, 1902. S. ½ SW. ¼ sec. 27, S. ½ SE. ¼ sec. 28, T. 7 N., R. 5 E., B. M.

Walter L. Harrison, No. 274; November 26, 1901; cash entry No. 2063; final proof, February 12, 1902. Lot 3, NE. ¼ SW. ¼, NW. ¼ SE. ¼ sec. 30, T. 7 N., R. 5 E., B. M. SW. ¼ NE. ¼ sec. 30, T. 7 N., R. 5 E., B. M.

31 Louis M Pritchard, No. 330; March 21, 1902; cash entry No. 1841; final proof, June 13, 1902. NW. ¼ sec. 20, T. 6 N., R. 6 E., B. M.

Louise E. Butler, No. 581; September 15, 1902; cash entry No. 2254; final proof, January 8, 1903. N. ½ SW. ¼, N. ½ SE. ¼ sec. 4, T. 7 N., R. 8 E., B. M.

32 And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, John Kinkaid, Louis M. Pritchard, and John I. Wells did, at the city of Boise, in the State of Idaho, unlawfully solicit, induce, and procure the following persons, namely: John J. Keane,

Roy Dye, Henry T. James, John I. Wells, Samuel Dye, Oral Dye, Kate Hunter, Dean West, Louisa B. West, William Pearson, Margaret Pearson, Lelia Lee, Arthur E. Brookhart, Gustav A. Link, Mary Link, Harry L. Clyne, Louis Nibler, Edward Brisbin, William W. Abrams, Lewis K. Burns, Lewis L. Folsom, Walter L. Harrison, James O. Baker, Charles W. Balentine, Norman H. Young, Lettie L. Stehpenson, Martin S. Stephenson, Charles N. Arbuckle, Susan N. Arbuckle, Altha Gillum, Mack Gillum, Samuel Greig, Sarah Greig, Patrick H. Downs, Albert B. Ewing, William H. Martin, Henrietta S. Martin, Ery A. Wilmot, Edward E. Butler, Wilbert F. Wilmot, Louis M. Pritchard, Louise E. Butler, Elvie M. Butler, General L. Willhite, Sonora A. Joplin, Andrew F. Joplin, Walter Joplin, William E. Cavanaugh, William H. Gibberd, Willis A. Ross, Josie M. Ross, Clara M. Snow, George E. Eagleson, Mary J. Eagleson, Alexander T. Ellis, Joseph Ehrmanntrant, Margaret M. Ehrmanntrant, George R. Avery, Frank R. Martin, Wheeler H. Martin, Thomas L. Martin, Rice J. Harbaugh, Margaret Scully, Abbie M. Briggs, George G. Gibson, Uriah F. McBurney, Clifton C. Bliven, and Thomas F. Kelly, to convey either to A. E. Palmer, otherwise known as Albert E. Palmer, or George S. Long or Horace S. Rand all their interest in and title to the lands in the county of Boise, in the State of Idaho, theretofore entered and purchased by them at the United States land office at Boise, in the State of Idaho, under the laws of the
33 United States, which lands and dates of entry and purchase are hereinbefore in this count more particularly set forth and described.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the tenth day of April, in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer did, at the city of Boise, in the State of Idaho, solicit, induce, and procure George S. Long to make, execute, and deliver a deed of conveyance, releasing, quitclaiming, and conveying to the said Barber Lumber Company all his right, title, and interest in and to the following-described timber lands, situate in the county of Boise, in the State of Idaho, to wit: Township 5 north, range 4 east, Boise meridian, section 4, lots 5, 6, 7, SW. ¼ of NW. ¼, NE. ¼ of SW. ¼, W. ½ of SE. ¼; section 9, NW. ¼ of NE. ¼; township 6 north, range 4 east, Boise meridian, section 1, lot 2, SW. ¼ of NE. ¼, W. ½ of SE. ¼; section 12, SW. ¼ of NE. ¼, N. ½ of SE. ¼, SE. ¼ of SE. ¼; section 15, NE. ¼ of NW. ¼, SW. ¼ of SW. ¼; section 17, SE. ¼ of SW. ¼, NE. ¼ of SE. ¼, S. ½ of SE. ¼; section 20, NE. ¼, NW. ¼, SW. ¼, SE. ¼; section 21, NE. ¼, NW. ¼, SW. ¼, SE. ¼; section 22, W. ½ of NE. ¼, N. ½ of NW. ¼, SW. ¼ of NW. ¼, W. ½ of SW. ¼, SE. ¼ of SW. ¼; section 23, SW. ¼; section 27, E. ½ of NE. ¼, S. ½ of SE. ¼; section 28, W. ½ of NE. ¼, NW. ¼, SW. ¼, W. ½ of SE. ¼; section 29, NE. ¼, NW. ¼, SW. ¼, SE. ¼.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that, thereafter, to wit, on the twenty-seventh day of May, in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Albert E. Palmer, with the knowledge and consent and upon the request of the said James T. Barber, Sumner G. Moon, and Frank Martin, did make and execute a deed of conveyance granting and conveying to the said Barber Lumber Company all his right
34 title, and interest in and to the following-described timber lands situate in the county of Boise, in the State of Idaho, to wit:

Township 6 north, range 5 east, Boise meridian, SE. ¼ section 7.

Township 6 north, range 6 east, Boise meridian, E. ½ SE. ¼ section 7; S. ½ SW. ¼ sec. 8; NW. ¼ S. ½, SW. ¼ S. ½, SE. ¼ sec. 17; E. ½ NE. ¼ sec. 18; E. ½ NE. ¼, E. ½ SE. ¼ sec. 19; all of sec. 20; W. ½ sec. 21; W. ½ sec. 28; NE. ¼ N. ½, SW. ¼ SW. ¼ SW. ¼, NW. ¼ SE. ¼ sec. 29; SE. ¼ sec. 31; NE. ¼ E. ½ NW. ¼, E. ½ SW. ¼, SE. ¼ sec. 32; W. ½ sec. 33.

Township 6 north, range 7 east, Boise meridian, lots 1, 2, S. ½ NE. ¼ sec. 1.

Township 7 north, range 4 east, Boise meridian, SW. ¼ NE. ¼, S. ½ NW. ¼, SW. ¼, NW. ¼ SE. ¼, sec. 33; SW. ¼ NE. ¼ S. ½ NW. ¼ sec. 34.

Township 7 north, range 5 east, Boise meridian, lots 3, 4, SE. ¼ NW. ¼ N. ½ SW. ¼, SE. ¼ SW. ¼, SE. ¼ sec. 1; lots 1, 2, 3, S. ½ NE. ¼ S. ½ NW. ¼ sec. 2; lot 4, SW. ¼ NW ¼ sec. 4; lots 3, 4, S. ½ NW. ¼, SE. ¼ S. ½ SE. ¼ sec. 5; SE. ¼ sec. 6; NE. ¼ SE. ¼, NW. ¼, E. ½ SW. ¼, SE. ¼ sec. 7; NW. ¼, NW. ¼, SW. ¼, NW. ¼ SE. ¼, S. ½ SE. ¼ sec. 8; SE. ¼ sec. 11; NE. ¼, E. ½ NW. ¼, SW. ¼, NW. ¼ sec. 12; NE. ¼, NW. ¼, SE. ¼ sec. 13; NE. ¼ sec. 14; S. ½ sec. 15; N. ½ NE. ¼, NW. ¼, SW. ¼ sec. 17; NE. ¼, NE. ¼ NW. ¼, N. ½ SE. ¼ sec. 18; SW. ¼ NE. ¼, NW. ¼ SE. ¼, S. ½ SE. ¼ sec. 19; NE. ¼ E. ½ SW. ¼, SE. ¼ sec. 21; NW. ¼ NE. ¼, NW. ¼, SW. ¼, SE. ¼ sec. 22; all of sec. 23; all of sec. 24; NE. ¼, NW. ¼, SE. ¼ sec. 25; NW. ¼ NE. ¼, N. ½ NW. ¼, S. ½ SW. ¼ sec. 27; NE. ¼, E. ½ NW. ¼, S. ½ SE. ¼ sec. 28; W. ½ NE. ¼, E. ½ NW. ¼, lots 1, 3, 4, E. ½ SW. ¼, NW. ¼ SE. ¼ sec. 30; W. ½ NE. ¼, E. ½ NW. ¼ lot 1, NE. ¼ SW. ¼ sec. 31; E. ½ NE. ¼, SE. ¼ sec. 33; W. ½ NE. ¼, NW. ¼, SE. ¼ sec. 34; S. ½ sec. 35.

Township 7 north, range 6 east, Boise meridian, lots 3, 4, 5, 6, 7, SE. ¼ NW. ¼, N. ½ SW. ¼, E. ½ SW. ¼ sec. 6; lots 3, 4, E. ½ SW. ¼ sec. 7; lots 1, 2, E. ½ NW. ¼ sec. 18.

Township 7 north, range 7 east, Boise meridian, E. ½ sec. 25.

35 Township 8 north, range 5 east, Boise meridian, S. ½ NE. ¼ S. ½ NW. ¼, SW. ¼, SE. ¼, sec. 25; E. ½ sec. 26; SW. ¼ NE. ¼, W. ½ SE. ¼, sec. 27; S. ½ SW. ¼, sec. 32; S. ½ NW. ¼, SW. ¼, sec. 33; NW. ¼ NE. ¼, sec. 34; NE. ¼ E. ½ NW. ¼, E. ½ NW. ¼, sec. 35.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the twenty-eighth day of June,

in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Albert E. Palmer, with the knowledge and consent and upon the request of the said James T. Barber, Sumner G. Moon, and Frank Martin, did make and execute a deed granting and conveying to the said Barber Lumber Company all his right, title, and interest in and to the following described timber lands situate in the county of Boise, in the State of Idaho, to wit:

NE. ¼, E. ½ NW. ¼, E. ½ SW. ¼, section 32, township 6 north, range 6 east, Boise meridian.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the second day of January, in the year nineteen hundred and six, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said Albert E. Palmer, with the knowledge and consent and upon the request of said James T. Barber, Sumner G. Moon, and Frank Martin, did make and execute a deed granting and conveying to the said Barber Lumber Company all his right, title, and interest in and to the following described timber lands situate in the county of Boise, in the State of Idaho, to wit:

Lots 1, 2, 3, section 31, township 6 north, range 6 east, Boise meridian.

And the grand jurors aforesaid, upon their oath aforesaid,
36 do further present that thereafter, to wit, on the fifth day of July, in the year nineteen hundred and five, and on the second day of February, in the year nineteen hundred and seven, respectively, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer, did, in the county of Boise, in the State of Idaho, and within the jurisdiction of this court, have, cause, and procure the said two deeds last hereinbefore referred to, recorded in the office of the recorder of the county of Boise, in the State of Idaho, on the respective dates aforesaid.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the fifteenth day of April, in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer did, in the county of Boise, in the State of Idaho, and within the jurisdiction of this court, have, cause, and procure the said deed from George S. Long to said Barber Lumber Company, dated the tenth day of April, in the year nineteen hundred and five, hereinbefore referred to, recorded in the office of the recorder of the county of Boise, in the State of Idaho.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the twenty-second day of May, in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer did, at the city of Boise, in the State of Idaho, solicit, induce, and procure one L. G. Chapman, the manager of the Barber
37 Lumber Company at Boise, Idaho, to write and mail to Horace S. Rand, at Burlington, in the State of Iowa, a letter in the form and of the tenor following, to wit:

"BARBER LUMBER COMPANY,
"*Boise, Idaho, May 22, 1905.*

"Mr. H. S. RAND,
"*% Burlington Lumber Co.,*
"*Burlington, Iowa.*

"DEAR SIR: We enclose herewith quitclaim deed covering lands on the Boise River which have been purchased in your name.

"Will you kindly execute the same and have it executed by Mrs. Rand and return it to us at your convenience?

"Yours, truly,

"L. G. CHAPMAN, *Manager.*

"Enc."

And the grand jurors aforesaid, upon their oath aforesaid, do further present that thereafter, to wit, on the twenty-seventh day of July, in the year nineteen hundred and five, in furtherance, continuance, and renewal of said unlawful conspiracy, combination, confederation, and agreement, and to effect the object thereof, the said James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer, at the city of Boise, in the State of Idaho, did receive and accept the delivery of a deed dated on the twenty-fourth day of July, in the year nineteen hundred and five, made and executed by Horace S. Rand, conveying to the Barber Lumber Company, in fee
38 simple, all his right, title, and interest in and to the following-described timber lands, situate in the county of Boise, in the State of Idaho, to wit:

Township 6 N., R. 7 E., B. M., section 1, lots 3–4, S. ½ NW. ¼, N. ½ SE. ¼, SE. ¼ SE. ¼, section 12, NE. ¼ NE. ¼, T. 6 N., R. 8 E., B. M., section 5, lots 1, 2, 3, 4, section 6, lots 2, 3, 4, 5, 6, 7, SW. ¼ NE. ¼ SE. ¼ NW. ¼, section 17, W. ½ NE. ¼ E. ½ NW. ¼, section 29, NW. ¼ SW. ¼, section 30, NE. ¼, section 31, E. ½ NE. ¼, section 32, W. ½ NW. ¼ E. ½ SE. ¼, section 33, W. ½ SW. ¼.

Township 7 N., R. 7 E., B. M., section 1, lots 1, 2, 3, 4, section 2, lots 1, 2, 3, 4, S. ½ NE. ¼, S. ½ NW. ¼, section 3, lots 2, 3, SW. ¼ NE. ¼, SE. ¼, NW. ¼ E. ½ SW. ¼, W. ½ SE. ¼, section 11, E. ½ SE. ¼, section 12, NE. ¼, NW. ¼, NW. ¼, S. ½ NW. ¼, SW. ¼ SE. ¼, section 13, SW. ¼ NE. ¼, NW. ¼, section 14, E. ½ NE. ¼, NE. ¼ SE. ¼, S. ½ SE. ¼, sec-

tion 15, N. ½ SW. ¼, N. ½ SE. ¼, section 21, NE. ¼ SE. ¼, section 22, W. ½ NE. ¼, E ½ NW. ¼, N. ½ SW. ¼, SW. ¼ SW. ¼, section 23, N. ½ NE. ¼, section 24, E. ½ NE. ¼, N. ½ SE. ¼, section 26, SW. ¼ NW. ¼, W. ½ SW. ¼, section 27, NE. ¼ SE. ¼.

Township 7 N., R. 8 E., B. M., section 2, lots 4, SW. ¼ NW. ¼, W. ½ SW. ¼, section 3, lots 1, 2, S. ½ NE. ¼, SW. ¼, SE. ¼, section 4, lots 1, 2, 3, 4, S. ½ NE. ¼, S. ½ NW. ¼, SW. ¼, N. ½ SE. ¼, SW. ¼ SE. ¼, section 7, lots 1, 2, 3, 4, E. ½ NW. ¼ E. ½ SW. ¼, SE. ¼, section 8, SW. ¼, section 9, S. ½ NE. ¼, NW. ¼ NW. ¼, N. ½ SE. ¼, section 10, NE. ¼ NW. ¼, SW. ¼, SE. ¼, section 11, NW. ¼, SW. ¼, section 12, SW. ¼, SE. ¼, section 13, NW. ¼, section 14, W. ½ NE. ¼, NW. ¼, SW. ¼, W. ½ SE. ¼, section 15, N. ½ NE. ¼, N. ½ NW. ¼, S. ½ SE. ¼, section 17, SE. ¼ NE. ¼, NE. ¼ SE. ¼, S. ½ SE. ¼, section 18, lot 4, SE. ¼ SW. ¼, S. ½ SE. ¼, section 19, NW. ¼ NE. ¼, S. ½ NE. ¼, lots 1, 2, 3, E. ½ NW. ¼, NE. ¼ SW. ¼, N. ½ SE. ¼, section 20, NW. ¼ NE. ¼, S. ½ NE. ¼, SW. ¼, NW. ¼ NE. ¼, SE. ¼, section 21, NE. ¼, NE. ¼ NW. ¼, S. ½ NW. ¼, NW. ¼, SW. ¼, section 22, NE. ¼, NW. ¼, SW. ¼, SE. ¼, section 23, N. ½ NE. ¼, NE. ¼ NW. ¼, S. ½ NW. ¼, SW. ¼, section 24, S. ½ NE. ¼, NW. ¼, N. ½ SW. ¼, SE. ¼ SW. ¼, SE. ¼, section 25, NE. ¼, NW. ¼, SW. ¼, SE. ¼, section 26, SE. ¼ NE. ¼, N. ½ NW. ¼,
39 SW. ¼ NW. ¼, NW. ¼ SW. ¼, NE. ¼ SE. ¼, S. ½ SE. ¼, section 27, NE. ¼, NW. ¼ N ½ SW. ¼, SE. ¼, section 28, NE. ¼ N. ½ SE. ¼, section 29, SW. ¼ SW. ¼, section 30, lots 1, 2, 3, 4, SE. ¼ SW. ¼, S. ½ SE. ¼, section 31, NE. ¼, lots 1, 2, E. ½ NW. ¼, SE. ¼, section 32, NE. ¼, NW. ¼, SW. ¼, SE. ¼, section 33, SW. ¼ section 34, E. ½ NE. ¼, N. ½ SE. ¼, section 35, NE. ¼.

Containing 15,496 65/100 acres.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the same in such case made and provided.

(Signed) WILLIAM R. HARR,
(Signed) PEYTON GORDON,
Special Assistants to the Attorney-General.

WILLIAM M. BRIGGS,
Foreman of the United States Grand Jury.

40 The following are the names of the witnesses examined before and by the grand jury in the above case:

G. D. Hoseley, T. F. Halveston, H. N. Coffin, B. F. Olden, Albert Nugent, Junius Wright, J. T. Morrison, J. J. Keane, C. W. Ballentyne, Mary Link, Harry Clyne, Mack Gillum, Gustave A. Link, Dean West, Louisa B. West, Samuel Greig, Sarah Greig, Oral Dye, William Pearson, Louis K. Burns, E. E. Garrett, Margaret Pearson, Frank Cooper, Louisa E. Butler, George W. Butler, Louis Nibler, Arthur Andersen, Andrew Joplin, Rice J. Harbaugh, M. A. Zapp, George S. Long, A. G. Foster, Sherman Glenn, H. S. Rand, Edw. Brisbin, A. B. Campbell, L. S. Dille, C. M. Wilmot, E. A. Wilmot, W. F. Wilmot, C. C. Blevin, Leon S. Simpson, Mrs. E. J. Phelps, Walter S. Harrison, Joseph M. Hollister, Lenora Hollister, T. S.

Weston, Wm. A. Coleman, Mary J. Martin, Nettie Weston,
41 T. B. Martin, L. R. Dukes, W. H. Gibbard, W. A. Ross, Patrick H. Downs, John I. Wells, Harry S. Worthman, W. W. Abrams, E. N. Seale, E. E. Butler.

Bail of Defendant Martin fixed at $2,500.00, his own recognizance. Each of the other defendants $5,000.00, with sufficient sureties.

(Signed) DIETRICH, *Judge.*

(Endorsed:) Filed April 14, 1908. A. L. Richardson, clerk.

42 *Notice.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
JAMES T. BARBER, SUMNER G. MOON, FRANK Martin, and Albert E. Palmer.

To C. H. Lingenfelter, esq., United States district attorney, Boise, Idaho:

You will please take notice that at the opening of the September term of the above entitled court at Boise City, Idaho, to wit, on the 14th day of September, 1908, at the hour of 10 o'clock a. m., or as soon as counsel can be heard, we, the undersigned attorneys for defendant Frank Martin will request and insist upon an immediate trial of the said defendant Frank Martin in said cause.

J. H. HAWLEY,
J. C. RICE,
K. I. PERKY,
Attorneys for defendant Frank Martin, residence, Boise, Idaho.

Due service of the foregoing admitted this 1st day of August, 1908.

C. H. LINGENFELTER,
United States District Attorney,
By VAN W. HASBROUCK,
Assistant.

(Endorsed:) Filed August 1, 1908. A. L. Richardson, clerk.

43 *Motion.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA
vs.
JAMES T. BARBER, SUMNER G. MOON, FRANK Martin, and Albert E. Palmer. } Motion.

To the Honorable Frank S. Dietrich, judge of the United States District Court, District of Idaho:

Comes now C. H. Lingenfelter, United States attorney for the District of Idaho and on behalf of the plaintiff, the United States

of America, moves the honorable the above-entitled court to grant to the plaintiff a continuance of the above-entitled cause until the next regular term of the above-entitled court at Boise, for the reasons specifically set forth in the affidavit hereto attached and the records and files in this action.

C. H. LINGENFELTER,
United States District Attorney
for the District of Idaho.

44 *Notice and motion for continuance.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, and ALBERT E. PALMER.	Notice and motion for continuance.

To J. H. Hawley, J. C. Rice, and K. I. Perky, attorneys for defendant Frank Martin, Boise, Idaho:

Whereas on the 1st day of August, 1908, there was filed in the above-entitled court, by the above-named attorneys, a notice to the undersigned United States attorney, setting forth that at the opening of the September term of the above-entitled court at Boise City, Idaho, to wit, on the 14th day of September, 1908, at the hour of 10 o'clock a. m., or as soon as counsel can be heard, the above-named attorneys for the defendant Frank Martin would request and insist upon an immediate trial of the said Frank Martin in said cause.

You will please take notice that upon the calling of said motion aforesaid the undersigned United States district attorney, attorney for plaintiff, will move the court for a continuance of the above-entitled cause, for the term, and oppose the granting of the motion for immediate trial of the said Frank Martin on the grounds contained in the affidavit hereto attached and made a part of this motion and herewith served upon you. On the hearing of said motion the plaintiff will use the above motion and notice, the affidavit attached, and the files and records now on file and of record in the
45 above-entitled cause or so much thereof as may be necessary.

C. H. LINGENFELTER,
United States District Attorney.

Due service of the foregoing motion, notice, and affidavit attached admitted this 9th day of September, A. D. 1908.

J. H. HAWLEY,
J. C. RICE,
K. I. PERKY,
Attorneys for Frank Martin, Deft.

46 *Affidavit for continuance.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer.	Affidavit for continuance.

STATE OF IDAHO,
County of Ada, ss:

C. H. Lingenfelter, being first duly sworn on oath, deposes and says that he is the United States district attorney for the district of Idaho and makes this affidavit for and on behalf of the United States of America, the plaintiff in the above-entitled cause; that affiant received notice from the attorneys for the defendant Frank Martin, in the above-entitled cause, on the first day of August, 1908, that they would request and insist upon an immediate trial of the said defendant Martin in said cause, and that said request would be presented to the above-entitled court on the 14th day of September, at 10 o'clock a. m., or as soon as counsel could be heard; that immediately upon receipt of such notice this affiant notified the honorable Attorney-General of the United States, at Washington, D. C., of the service of such notice; that in reply thereto this affiant received a telegram from the Attorney-General stating that he, the said Attorney-General, intends to appoint special counsel for trial of this cause, as was done in other cases, and represents strongly that it will be impossible for such counsel to try such case in September,
47 which such telegram is hereto attached and made a part of this affidavit, the same as if here fully set out; that thereafter affiant's assistant, Van W. Hasbrouck, received from the Hon. Charles J. Bonaparte, Attorney-General for the United States of America, reiterating the facts set forth in said telegram, which said letter is hereto attached and made a part of this affidavit the same as if fully set out herein; that affiant states that the Attorney-General has appoint' special counsel to take charge of the above matter in the persons of his special assistants, Mr. Peyton Gordon and Mr. Sylvester R. Rush; that affiant received a letter from said Peyton Gordon, special assistant to the Attorney-General, and one of the counsel appointed by the Attorney-General to take charge of said case, in which it is stated to be the fact that said Sylvester R. Rush is preparing briefs in several government cases, which he is to argue in the Circuit Court of Appeals for the Eighth Circuit, at Denver, in September, and that the cases in which he is engaged are at present set to be heard September 15th; that said Peyton Gordon is engaged at Madison, Wisconsin, on a government case and will be until after the middle of September; that the said letter of said Peyton Gordon is hereto attached and made a part of this affidavit the same as if

herein fully set out; that affiant states that he is wholly unfamiliar with this case, having but recently assumed the office of United States attorney for this district, and that he is wholly unprepared to go to trial of the same at this term of the court, and that it was not the intention to have this affiant represent the Government in this behalf; that heretofore the Government has been diligently endeavoring to remove the defendants Barber and Moon to this district for trial in order to try all of the defendants together, as the matter in-
48 volves a charge of conspiracy to defraud the Government; that said defendants Barber and Moon have resisted said removal, and the action on said proceedings for removal have but recently been determined adversely to the Government and the Government is still proceeding against said defendants; that the Government has been using all due diligence to bring this matter to trial and is so doing at this time, but that the forcing of a trial of the said Frank Martin at this time would work great injury upon the plaintiff, the United States of America, and great embarrassment in the premises through no fault, negligence, or delay on the part of the said plaintiff.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho.

Subscribed and sworn to before me this 9th day of September, A. D. 1908.

A. L. RICHARDSON, *Clerk.*

49 [56 collect Govt.]

HOTEL ASPINWALL,
Lenox, Mass., Aug. 6, 1908.

UNITED STATES ATTORNEY, *Boise, Ida.*

You are instructed to oppose motion for trial of Martin. State to court that Attorney-General intends to appoint special counsel for trial for these cases, as was done in other case, and represents strongly that it will be absolutely impossible for such counsel to try cases in September.

BONAPARTE.

9 a. m.

50 OFFICE OF THE ATTORNEY-GENERAL, WASHINGTON, D. C.,
HOTEL ASPINWALL,
Lenox, Mass., August 14, 1908.

VAN W. HASBROUCK, Esq.,
Assistant United States Attorney,
Boise, Idaho.

SIR: Referring to your letter of the 3rd instant in regard to the proposed motion for immediate trial in the case of Frank Martin, I beg to say that United States Attorney Lingenfelter was, both by

telegram and letter, advised that he should resist this application on the ground that the Government proposes to appoint special counsel in these cases, and that it will be entirely impracticable to go on with Martin's immediate trial. Definite instructions on this point having been sent to Mr. Lingenfelter, I presume that you have before this received his instructions in the premises, and that the directions given by the department will be carefully carried out.

Very respectfully,

CHARLES J. BONAPARTE,
Attorney-General.

51 AUG. 18, 1908.

The ATTORNEY-GENERAL,
Lenox, Mass.

SIR: Referring to your letter of the 14th, 59512–11, in re proposed motion for immediate trial in the case of Frank Martin, I have the honor to inform you that this office is advised as to your wishes in the matter and will oppose such motion according to your instructions. The hearing on this motion will be had, as previously advised, on the convening of the September term of the court here at Boise; that is, on the 14th of September, or as soon thereafter as counsel for defendant can be heard.

Immediately upon receipt of your telegram, setting forth the inability of the Government to proceed, and that special counsel would be appointed to conduct the cases, I notified the court of the filing of the motion and the position of the Government in reference thereto. At the proper time an affidavit will be presented to the court setting up the facts as contained in your communications.

Respectfully,

_____ _____,
Assistant U. S. Attorney

52 MADISON, *Wisconsin, August 26, 1908.*

Mr. CHARLES H. LINGENFELTER,
United States Attorney, Boise, Idaho.

SIR: I beg to acknowledge receipt of your telegram advising me that the motion for severance and trial of Frank Martin will be called for hearing on September 14th.

The Attorney-General has assigned Mr. Sylvester R. Rush and me to take charge of this case, together with the case of Barber, Moon, and Palmer. Mr. Rush is preparing briefs in several cases which he is to argue in the Circuit Court of Appeals for the 8th Circuit at Denver in September. The cases in which he is engaged are at present set to be heard September 15th. I am engaged here on a government case and will be until after the middle of September,

and it will be absolutely impossible for us to try Mr. Martin at the September term at Boise, much less prepare his case for trial.

Will you endeavor to have this motion go over until the next term of court at Boise, and if there is any objection to the hearing of the motion going over advise me at once and I will be at Boise September 14th to oppose the same. I am very busy here and do not wish to take that long trip simply to argue a motion unless it is absolutely necessary.

Very respectfully, PEYTON GORDON,
Special Assistant to the Attorney-General.

Write or wire me at Madison, Wis., c/o U. S. attorney.

(Endorsed): Filed Sept. 9, 1908. A. L. Richardson, clerk.

53 *Bond of Defendant Frank Martin.*

In the District Court of the United States within and for the Central Division, District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
FRANK MARTIN ET AL., DEFENDANTS.

Be it remembered that on this 17th day of September, *A.* 1908, personally came Frank Martin and acknowledged himself to owe to the United States of America the sum of two thousand and five hundred dollars, to be levied upon his goods and chattels, lands, and tenements if default be made in the condition following, to wit:

The condition of this recognizance is such that if the said Frank Martin shall personally appear before the District Court of the United States in and for the District of Idaho, Central Division, in the city of Boise, State of Idaho, and on the 17th day of September, 1908, being a day of regular term of said court, and from day to day thereafter, and then and there to answer to the indictment pending therein, for conspiracy to defraud the United States, under section 5440 R. S., U. S., and known as case No. 451, and then and there abide the further order of said court, and not to part without leave, then this recognizance to be void, otherwise to be and remain in full force and virtue.

FRANK MARTIN.

Witnesses:
J. H. HAWLEY.
A. L. RICHARDSON.

Approved:
FRANK S. DIETRICH, *Judge.*

(Endorsed:) Filed Sept. 17, 1908. A. L. Richardson, clerk.

54 *Affidavit in opposition to motion.*

In the Circuit Court of the United States, Ninth Judicial Circuit for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, and ALBERT E. PALMER.	Affidavit of Peyton Gordon in opposition to motion that case be set for trial at present term of court.

STATE OF IDAHO,
County of Ada, ss:

Peyton Gordon, being first duly sworn, on oath deposes and says, that he is a special assistant to the Attorney-General of the United States; that on or about the 15th day of August, 1908, he received instructions from the Attorney-General to take charge of the preparation and trial of the above-entitled case now pending on the criminal docket of this court; that about the same date Sylvester R. Rush, also a special assistant to the Attorney-General, was directed by the Attorney-General to assist in the preparation and trial of said case; that prior to said assignment affiant was engaged on behalf of the United States in a proceeding pending in the United States District Court for Western District of Wisconsin for the removal, under section 1014 of the Revised Statutes of the United States, of James T. Barber and Sumner G. Moon, two of the defendants in said case, to within the jurisdiction of this court for trial upon an indictment now pending in this court, charging the said Barber and Moon of conspiring to defraud the United States; and that since said assignment affiant has been actually engaged in a proceeding in
55 the said District Court for the Western District of Wisconsin for the removal of said Barber and Moon to within the jurisdiction of this court for trial upon the indictment in this case, in which they are jointly indicted with the said Frank Martin, and which case the said Frank Martin now moves the court to set for trial at the present term thereof; that affiant arrived at Boise, Idaho, September the 13th, 1908, for the purpose of being present on behalf of the United States as its counsel at the taking of testimony to be used in the said Wisconsin court in resisting an order of said court for the removal of said Barber and Moon to this jurisdiction for trial upon the indictment last hereinbefore referred to; and that affiant has been actually engaged since his arrival at Boise at the taking of said testimony; and that September the 18th, 1908, is the date set for a hearing upon said proceedings at Eau Claire, Wisconsin; that in compliance with the suggestion of the court, before whom the said motion of the said Martin was made, and immediately there-

after, affiant conferred with Mr. James H. Hawley, counsel for the said Frank Martin, with the view of agreeing upon a date for the trial of said Martin that would be acceptable to all parties concerned; that at said conference affiant stated to Mr. Hawley and the said Frank Martin that in view of the fact that he had been advised that the said Sylvester R. Rush had ever since his assignment to take part in said case been actually engaged as counsel for the United States in other cases in which the United States was a party, and that said Sylvester R. Rush would be actually engaged on behalf of the United States in arguing a case in the United States Circuit Court of Appeals at Denver on the following day, to wit, September 14th, 1908, and would be actually engaged, as counsel for the United
56 States, in other cases then pending in the federal court until about November the first, 1908, and that it would be impracticable for affiant to agree to the setting of said case for trial on a day between the first and the fourth week in October, 1908, as had been suggested by the court; and that until affiant would be able to advise counsel for the said Frank Martin definitely on the matter it would be necessary for affiant to communicate with the said Sylvester R. Rush and be informed with certainty as to the engagements of Mr. Rush in other federal courts; that thereafter on the 16th of September, 1908, affiant sent the following telegram to Mr. Rush:

"BOISE, IDAHO, *September 16, 1908.*

"S. R. RUSH,

"*Special Assistant to Attorney-General,*

"*Brown Palace Hotel, Denver, Colorado.*

"Upon hearing Martin motion for trial at this term of court, which necessarily means a severence, Judge Dietrich on fourteenth decided that Martin was entitled to a speedy trial, and directed that we consult defendants' counsel with a view of agreeing upon a day between the first and the last week of October for trial. I urged that I was engaged in a Wisconsin court on same indictment and that we had been recently assigned to the case, and that in view of our other engagements it would be impossible to prepare the case for trial in the limited time suggested by the court. Also stated that you were actually engaged in trial of a government case in the Circuit Court of Appeals at Denver and to my knowledge would be engaged in other government cases already set for hearing until about November first. As I was not advised as to the exact details of your engagements, was somewhat embarrassed and consequently unable to state to the court frankly the earliest date we could give to the preparation of this case consistent with other cases of equal importance so as not to be in the same trouble with other federal courts as here. The court has deferred actual setting of the case until I can hear from you. Wire me immediately what your engagements are and the earliest possible date you can give to the preparation of this case for trial, so that I may present the same to the court. Of course after we have presented this to the court I trust that the court in setting the case

will see that it is but reasonable and fair to both sides and render our predicament less embarrassing.

"GORDON."

That in response to said telegram, at 8.30 o'clock p. m. of September 18th, 1908, affiant received from Mr. Rush a telegram to the
57 effect that he had finished the argument in the case before the Circuit Court of Appeals at Denver that day and that witnesses were already subpœnaed in a case to be heard at Omaha the first week in October, and that the trial of said case would take about three weeks, and to set the case of Martin for trial early in November, which said telegram is attached hereto and made a part hereof.

PEYTON GORDON.

Subscribed and sworn to before me this 17th day of September, A. D. 1908.

A. L. RICHARDSON, *Clerk.*

58 [38 collect Government.]

BO DENVER, COLO., *Sept. 16–'08.*

GORDON, *Special Asst. Atty General,*
Idanha Hotel, Boise, Idaho.

Argument finished here to-day. Witnesses already subpœnaed in case at Omaha first week in October. Case will take about three weeks. Set case early in November.

RUSH.

(Endorsed:) Filed Sept. 17, 1908. A. L. Richardson, clerk.

59 *Demurrer.*

In the District Court of the United States, Central Division of the District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
SUMNER G. MOON AND JAMES T. BARBER, DEFENDANTS. } Demurrer.

Comes now the defendants and file this their demurrer to the indictment in the above-entitled action and for grounds of demurrer allege:

1st. That the indictment does not state facts sufficient to constitute a public offense.

2nd. That the facts stated in the indictment do not constitute any violation of the Constitution or laws of the United States.

3rd. That the indictment shows upon its face that the action is barred by the provisions of sec. 1044 of the Revised Statutes of the United States.

(a) The defendants demur to the first count set forth in said indictment and for ground of demurrer allege that the said count does not state facts sufficient to constitute a public offense.

(b) That the facts stated in said count and the cause of action alleged therein is barred by the provisions of section 1044, Revised Statutes of the United States.

(a) The defendants demur to the second count set forth in said indictment for the reason that said count does not state facts sufficient to constitute a public offense.

60 (b) That said count does not state the agreement therein alleged to be fraudulent nor the terms thereof or the means by which the fraudulent purpose therein alleged was to be accomplished.

The defendants demur to the third count set forth in said indictment and for ground of demurrer allege:

(a) That the facts set forth in said third count of said indictment do not constitute any public offense.

(b) That the facts set forth in said count do not constitute any violation of the Constitution or any law of the United States.

(c) That the facts stated and the cause of action set forth in said third count of the indictment is barred by the provisions of sec. 1044 of the Revised Statutes of the United States.

ALFRED A. FRASER,
C. T. BUNDY,
J. H. HAWLEY,
Attorneys for the Defendants.

Service by copy admitted this 1st day of July, 1909.

C. H. LINGENFELTER,
U. S. Attorney.

(Endorsed:) Filed, July 1, 1909. A. L. Richardson, clerk.

61 *Demurrer to indictment.*

United States district court, central division, district of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, and Albert E. Palmer, defendants.

Now comes the above named defendants, James T. Barber and Sumner G. Moon, and each for himself separately demurrs to the fourth count of the indictment herein filed and returned on the fourteenth day of April, 1908, for the reason and upon the grounds that it appears upon the face of said indictment and said fourth count that such count does not state facts sufficient to constitute an offense against or under the laws of the United States.

A. A. FRASER,
C. T. BUNDY,
JAS. H. HAWLEY,
Attorneys for Defendants, Moon and Barber.

(Endorsed:) Filed December 15, 1909. A. L. Richardson, clerk.

62 *Plea in abatement.*

In the district court of the United States, within and for the central division of the district of Idaho.

UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, and ALBERT E. PALMER.	Plea in abatement.

Comes now the said James T. Barber by his attorneys, C. T. Bundy, Alfred A. Fraser, and J. H. Hawley, and, having read the said indictment, by leave of the court also first had and obtained, says the United States ought not to further prosecute this indictment against him, as to the matters and things and charges set forth in counts Nos. 1 and 4 of said indictment against him, the said James T. Barber, because he says the indictment was found and filed on the 14th day of April, 1908, and that said indictment was not found or filed or information instituted in the proper or any other court within three years after the commission of the offenses in said counts of said indictment specified, and because he says the offense is barred as to each count by the provisions of section 1044 of the Revised Statutes of the United States of America, in this, that more than three years have elapsed between the date of the commission of the alleged crime charged in each of said counts and the date of the finding of the said indictment, and in this behalf the defendant, James T. Barber, alleges that during all of said times between the commission of said alleged crime, to wit, the first day of Sep-
63 tember, 1901, up to the present date, and the filing of this plea, this defendant, the said James T. Barber, was a citizen and resident of the county of Eau Claire in the State of Wisconsin, and did have his home and usual and well known place of abode at Eau Claire, in the county of Eau Claire, State of Wisconsin, and was at all times subject to process of this court, and at no time during this period of time was he, the said James T. Barber, a fugitive from justice, or was he fleeing from justice, and that the said James T. Barber did not, at any time between the dates of the commission of the offense alleged and charged in each of the courts as aforesaid and the finding of said indictment, leave his home and well known place of abode in the city of Eau Claire, Wisconsin, with intent to avoid detection or punishment for any public offense against the United States, or at all.

Wherefore, he prays judgment that he may be dismissed and discharged by this court from the premises as to each of the counts No. 1 and 4 in the indictment above specified.

C. T. BUNDY,
ALFRED A. FRASER,
J. H. HAWLEY,
Attorneys for Defendant.

I hereby certify that, in my opinion, the plea herein stated and set forth is well founded in point of law.

ALFRED A. FRASER,
Attorney for Defendant.

(Endorsed:) Filed Dec. 16, 1909. A. L. Richardson, clerk.

64 *Plea in abatement.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA *vs.* JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, and ALBERT E. PALMER.	Plea in abatement.

Comes now the said Sumner G. Moon, by his attorneys, C. T. Bundy, Alfred A. Fraser, and J. H. Hawley, and, having read the said indictment, by leave of the court also first had and obtained, says the United States ought not to further prosecute this indictment against him, as to the matters and things and charges set forth in counts No. 1 and 4 of said indictment against him, the said Sumner G. Moon, because, he says, the indictment was found and filed on the 14th day of April, 1908, and that said indictment was not found or filed or information instituted in the proper or any other court within three years after the commission of the offenses in said counts of said indictment specified, and because, he says, the offense is barred as to each count by the provisions of section 1044 of the Revised Statutes of the United States of America, in this, that more than three years have elapsed between the date of the commission of the alleged crime charged in each of said counts and the date of the finding of the said indictment; and in this behalf the defendant, Sumner G. Moon, alleges that during all of said times between the commission of said alleged crime, to wit, the first day of Sep-
65 tember, 1901, up to the present date, and the filing of this plea, this defendant, the said Sumner G. Moon, was a citizen and resident of the county of Eau Claire, in the State of Wisconsin, and did have his home and usual and well-known place of abode at Eau Claire, in the county of Eau Claire, State of Wisconsin, and was at all times subject to process of this court, and at no time during this period of time was he, the said Sumner G. Moon, a fugitive from justice, or was he fleeing from justice, and that the said Sumner G. Moon did not at any time between the dates of the commission of the offense alleged and charged in each of the courts, as aforesaid, and the finding of said indictment leave his home and well-known place of abode in the city of Eau Claire, Wisconsin, with intent to avoid detection or punishment for any public offense against the United States or at all.

Wherefore he prays judgment that he may be dismissed and discharged by this court from the premises as to each of the counts No. 1 and 4 in the indictment above specified.

C. T. BUNDY,
ALFRED A. FRASER,
J. H. HAWLEY,
Attorneys for Defendant.

I hereby certify that, in my opinion, the plea herein stated and set forth is well founded in point of law.

ALFRED A. FRASER,
Attorney for Defendant.

(Endorsed:) Filed Dec. 16, 1909. A. L. Richardson, clerk.

66 *Demurrer to plea entitled plea in abatement.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, Albert E. Palmer, defendants.	No. 451. Demurrer to plea entitled plea in abatement.

And A. B. Jackson and Peyton Gordon, special assistants to the Attorney-General of the United States of America, who prosecute for the said United States in this behalf, as to the said plea of the said James T. Barber by him pleaded herein, say that the same and the matters therein contained, in so far as they relate to the fourth count of the indictment against him, the said James T. Barber, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said fourth count of the said indictment against him, the said James T. Barber, and that the said United States is not bound by law to answer the same; and this the said A. B. Jackson and Peyton Gordon, who prosecute as aforesaid, are ready to verify.

Wherefore, for want of sufficient plea in this behalf, the said A. B. Jackson and Peyton Gordon, for the said United States, pray judgment, and that the said James T. Barber may be convicted of the premises of the said indictment specified.

A. B. JACKSON,
PEYTON GORDON,
Special Assistants to the Attorney-General.

(Endorsed:) Filed Dec. 16, 1909. A. L. Richardson, clerk.

67 *Demurrer to plea entitled plea in abatement.*

In the District Court of the United States within and for the Central Division of the District of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, Albert E. Palmer, defendants.	No. 451. Demurrer to plea entitled plea in abatement.

And A. B. Jackson and Peyton Gordon, special assistants to the Attorney-General of the United States of America, who prosecute for the said United States in this behalf, as to the said plea of the said Sumner G. Moon by him pleaded herein, say that the same and the matters therein contained, insofar as they relate to the fourth count of the indictment against him, the said Sumner G. Moon, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said United States from prosecuting the said fourth count of the said indictment against him, the said Sumner G. Moon, and that the said United States is not bound by law to answer the same; and this the said A. B. Jackson and Peyton Gordon, who prosecute as aforesaid, are ready to verify.

Wherefore, for want of sufficient plea in this behalf, the said A. B. Jackson and Peyton Gordon, for the said United States, pray judgment and that the said Sumner G. Moon may be convicted of the premises of the said indictment specified.

A. B. JACKSON,
PEYTON GORDON,
Special Assistants to the Attorney-General.

(Endorsed:) Filed Dec. 16, 1909. A. L. Richardson, clerk.

68 *Stipulation.*

In the District Court of the United States, Central Division of the District of Idaho.

UNITED STATES, PLAINTIFF, *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer, defendants.	Stipulation.

The court, by order duly filed, having sustained the demurrer and plea of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment heretofore returned and filed in the above-entitled cause, it is hereby stipulated as follows:

That on demurrer of complainant to the plea interposed by said defendants to the fourth count of said indictment, the following facts shall be deemed stipulated and considered with the same force and effect as though they were fully set out in said plea:

A. That since September 1, 1901, and up to the time of making this stipulation, said defendants James T. Berber and Sumner G. Moon have resided and had their home and usual place of abode and place of business in the city of Eau Claire, Eau Claire County, State of Wisconsin, and during all of said times were and are citizens of the State of Wisconsin, and at no time within said period have defendants or either of them been without the territorial limits of the United States.

69 B. That a prior indictment was issued out of said court against said two defendants et al. charging the same offense, which indictment was filed in the State of Wisconsin, and on complaint therein said defendants were arrested on or about October 1, 1907, which arrest was made by defendants voluntarily appearing before the committing magistrate, as requested by the U. S. district attorney of Wisconsin, and that said defendants have voluntarily appeared from time to time before committing and removal magistrate, in State of Wisconsin, in the above-entitled proceedings, as and when requested.

C. That the defendant James T. Barber was never within the State of Idaho until the first of August, 1902, since which latter date he has visited and transacted business in said State upon the following dates: August 31, 1902; February 6, 1903; April 9, 1903; July 24, 1903; February 5, 1905; November 11, 1905; March 22, 1906; June 20, 1906; December 8, 1906.

And the defendant Sumner G. Moon was never in the State of Idaho until June 7, 1902; again on August 31, 1902; September 5, 1902; February 5, 1905; on March 22, 1906; and on June 20, 1906.

D. That on December 12, 1906, the said James T. Barber departed from the State of Idaho and returned to his home at Eau Claire, Wisconsin, and has not since that date been within the State of Idaho, and that the said Sumner G. Moon, on June 27, 1906, departed from the State of Idaho and returned to his home at Eau Claire, Wisconsin, and has not since that date been within the State of Idaho.

70 That at no time on or since September 1, 1901, and up to the time of making this stipulation have the said defendants or either of them left his home and well-known place of abode in the city of Eau Claire, Wis., with the intention of avoiding arrest, detection, or punishment for any public offense or misdemeanor against the United States or the State of Idaho, or any other State.

Dated this 21st day of December, 1909.

A. B. JACKSON,
PEYTON GORDON,
Special Assistants to Attorney-General,
Solicitors for Complainant.
C. T. BUNDY.
A. A. FRASER.
J. H. HAWLEY.

(Endorsed:) Filed Dec. 21, 1909. A. L. Richardson, clerk.

71 *Stipulation.*

In the District Court of the United States, Central Division of the District of Idaho.

UNITED STATES, PLAINTIFF, *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer, defendants.	Stipulation.

The court, by order duly filed, having sustained the demurrer and plea in abatement of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment heretofore returned and filed in the above entitled action, it is hereby stipulated as follows:

1st. That a nolle and order of dismissal shall, under the consent of the court, be entered in the above entitled proceedings as to counts numbered one, two, and three thereof.

2nd. That the demurrer and plea in abatement of the defendants to the fourth count of said indictment shall be heard and determined together, and that the order or ruling made on either shall be deemed to have been made on both.

Dated December 21, 1909.

A. B. JACKSON and
PEYTON GORDON,
Special Assistants to Attorney-General.
C. T. BUNDY,
A. A. FRASER, and
J. H. HAWLEY,
Solicitors for Defendants
James T. Barber and Sumner G. Moon.

(Endorsed:) Filed Dec. 21, 1909. A. L. Richardson, clerk.

72 *Journal entries.*

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the 14th day of September, 1908.

Present: Hon. Frank S. Dietrich, judge.

THE UNITED STATES *vs.* JAMES T. BARBER ET AL.	No. 451. Conspiracy.

On this day the defendant, Frank Martin, came into court in person and by his attorney, Jas. H. Hawley, esq., to be arraigned upon the true bill of indictment heretofore presented against him by the grand jury, the district attorney being present. In answer to the court the defendant stated his true name to be Frank Martin. The

formal reading of the indictment was waived and Defendant Martin furnished with a true copy thereof by order of court at the expense of the United States; and the said defendant, Frank Martin, stating that he was ready to plead and being asked for his plea pleaded that he is not guilty of the offense charged in the indictment. Thereupon, said cause came on to be heard upon the written notice and request of the said defendant, Martin, for an immediate trial, and upon the motion of plaintiff for a continuance of said cause, and after argument by Jas. H. Hawley, esq., on behalf of said defendant, and by C. H. Lingenfelter, U. S. district attorney and Peyton Gordon, esq., special assistant district attorney, on behalf of plaintiff, the court ordered that said motion for a continuance be denied.

73 Thursday, the 17th day of September, 1908.

THE UNITED STATES *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer.	No. 451. Conspiracy.

Ordered that the trial of this cause as to the defendant Frank Martin, be, and the same is hereby, fixed and set for November 4th, 1908, at 10 o'clock a. m.

Wednesday, the 4th day of November, 1908.

THE UNITED STATES *vs.* JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer.	No. 451. Conspiracy.

Now came the assistant U. S. district attorney, with the defendant, Frank Martin, and his counsel, and thereupon, on motion of said assistant U. S. district attorney, defendant's counsel consenting thereto, it was ordered that this cause be, and the same is hereby, dismissed as to the defendant Frank Martin, and that his bail be exonerated.

Wednesday, the 8th day of September, 1909.

THE UNITED STATES *vs.* JAMES T. BARBER ET AL.	No. 451. Conspiracy.

74 On motion of Peyton Gordon, esq., assistant to the Attorney-General, Alfred A. Fraser, esq., of counsel for defendants, being present. It is ordered that this cause be set for trial on Monday,

December 6, 1909, at 10 o'clock a. m., and by agreement of counsel the demurrer to the indictment herein is set for hearing on that day.

Saturday, the 4th day of December, 1909.

THE UNITED STATES
vs.
JAMES T. BARBER ET AL. } No. 451. Conspiracy.

By agreement of counsel for the respective parties herein, it is ordered that the demurrer to the indictment herein be set for hearing on the 15th inst. at 10 o'clock a. m., and ordered that said cause be set for trial on the 27th inst. at 10 o'clock a. m.

Wednesday, the 15th day of December, 1909.

THE UNITED STATES
vs.
JAMES T. BARBER ET AL. } No. 451. Conspiracy.

On motion of counsel for defendants, it is ordered that said defendants have leave to file a demurrer to the 4th count in the indictment herein, thereupon said cause came on to be heard before Hon. Robert S. Bean upon the demurrer to the indictment in said cause, Peyton Gordon, assistant to the Attorney-General, appearing as counsel on behalf of plaintiff, and C. T. Bundy and Alfred A. Fraser, esqs., appearing as counsel on behalf of defendants.

The court was addressed by C. T. Bundy, esq., on behalf of defendants, followed by Peyton Gordon, assistant to the
75 Attorney-General on behalf of plaintiff, during which the court adjourned the further hearing on said demurrer until to-morrow, the 16th inst., at 10 o'clock a. m.

Thursday, December 16th, 1909.

THE UNITED STATES
vs.
JAMES T. BARBER ET AL. } No. 451. Conspiracy.

The argument on the demurrer to the indictment herein adjourned on yesterday for further hearing was this day resumed, Peyton Gordon, assistant to the Attorney-General, continued the argument on behalf of plaintiff and against said demurrer. The argument was then closed by C. T. Bundy and Alfred A. Fraser, esq., on behalf of defendants, and said demurrers were submitted and taken under advisement by the court, with leave to defendants, by agreement of counsel for the respective parties, to file plea in abatement and motion to quash the indictment on account of duplicity.

76 *Judgment.*

Tuesday, the 21st day of December, 1909.

THE UNITED STATES
vs.
JAMES T. BARBER ET AL. } No. 451. Conspiracy.

Now came the attorneys for the respective parties herein and thereupon the demurrer to the third count in the indictment herein is withdrawn by the defendants. The demurrer to the second count of the indictment is confessed by complainant, and it is ordered that the demurrer and plea in abatement to the first count of the indictment be and is hereby overruled and denied. It is further ordered that plea in abatement to the fourth count of the indictment be and is hereby sustained. Thereupon counsel for the Government moved and asked that the three first counts of the indictment in the above entitled action be nollied; thereupon said motion was granted and the cause dismissed; all in accordance with the direction of Hon. Robert S. Bean, district judge, who heretofore heard and took under advisement said demurrer and plea in abatement.

Monday, the 27th day of December, 1909.

THE UNITED STATES
vs.
JAMES T. BARBER ET AL. } No. 451. Conspiracy.

On motion of Peyton Gordon, special assistant to the attorney-general, it is ordered that the plaintiff have leave to file separate demurrers to defendant's pleas in abatement, and that the same be filed nunc pro tunc, as of December 16, 1909.

77 *Telegram from Hon. Wm. B. Gilbert.*

PORTLAND, OGN., *Jan. 19th, 1910.*

A. L. RICHARDSON,
Clerk United States Circuit Court, Boise, Idaho:

Enter following order in The United States vs. James T. Barber, Sumner G. Moon, et al., now pending in the U. S. District Court on the petition of the plaintiff for writ of error, United States of America, District of Idaho, ss. Upon reading and filing the foregoing petition and the assignments of error therein referred to, it is ordered that the petition be and the same is hereby allowed, and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district under the seal of such Circuit Court pursuant to section one thousand and four of the Revised Statutes. Dated at Portland, Oregon, January nineteenth, nineteen hundred and ten.

WM. B. GILBERT, *Circuit Judge.*

And the following: United States of America, ss. The President of the United States, to the Honorable Judges of the District Court of the United States for the District of Idaho. Greeting: Because in the record decisions and proceedings which is in said District Court before you, between the United States of America, plaintiff, and James T. Barber, Sumner G. Moon, and other defendants, a manifest error hath happened to the great damage of the United States of America, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court at Washington within thirty days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done. Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of January, in the year of our Lord nineteen hundred and ten. Signed Clerk of the Circuit Court of the United States for the District of Idaho.

Allowed by William B. Gilbert, Circuit Judge.

I am sending you this on the assumption that the petition for the writ has been filed with you. If it has not, please wire me at once.

WM. B. GILBERT.

12.10 p. m.

Filed January 19, 1910.

A. L. RICHARDSON, *Clerk.*

78 *Petition for writ of error.*

In the District Court of the United States within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* JAMES T. BARBER, SUMNER G. MOON, et al., defendants.	No. 451. Petition for writ of error.

And now comes The United States of America, plaintiff herein, and says that on the twenty-first day of December, 1909, this court made its decision and judgment sustaining the pleas of the defendants, James T. Barber and Sumner G. Moon, to the fourth count of the indictment dismissing said cause and indictment as against the demurrers of the United States to said pleas, wherein defendants pleaded and set up the statute of limitations as a bar to the prosecution of this action against them for the reason that the offense

charged in the indictment was committed more than three years before the finding of said indictment; that by said judgment and decision certain errors were committed to the prejudice of this plaintiff, and of such character as to entitle this plaintiff, under the law, to review the said judgment and decision in the Supreme Court of the United States by writ of error, all of which will appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may
79 issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record and proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court.

A. B. JACKSON,
PEYTON GORDON,
Special Assistants to the Attorney-General.
S. L. TIPTON,
Assistant U. S. Attorney for the District of Idaho,
Attorneys for Plaintiff.

(Endorsed:) Filed Jan. 19, 1910. A. L. Richardson, clerk.

80 *Assignments of error.*

In the District Court of the United States within and for the District of Idaho, Central Division.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* JAMES T. BARBER, SUMNER G. Moon, et al., defendants.	No. 451. Assignments of error.

Comes now The United States of America, plaintiff in the above entitled cause, and files this its assignments of error upon which it will rely in the prosecution of the writ of error to be sued out by it for review by the Supreme Court of the judgment and decision heretofore entered by the District Court of the United States for the District of Idaho in the above entitled cause, to wit:

First. The District Court of the United States for the District of Idaho erred in sustaining the pleas of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment.

Second. The said District Court erred in dismissing said cause.

Third. That said District Court erred in overruling the demurrers interposed by the plaintiff to the pleas of the defendants James T. Barber and Sumner G. Moon.

Fourth. That the said District Court erred in not overruling the pleas of the defendants James T. Barber and Sumner G. Moon.

Wherefore the United States of America prays that the judgment of the District Court of the United States for the District of

81 Idaho be reversed and that the said District Court be directed to reinstate the said indictment and to proceed with the trial of the cause and said fourth count of the indictment.

A. B. JACKSON,
PEYTON GORDON,
Special Assistants to Attorney General.
S. L. TIPTON,
Assistant U. S. Attorney for the District of Idaho,
Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
District of Idaho, ss:

Upon reading and filing the foregoing petition and the assignments of error therein referred to it is ordered that the petition be, and the same hereby is, allowed and that a writ of error as therein prayed be issued by the clerk of the Circuit Court for this district, under the seal of such Circuit Court pursuant to section one thousand and four of the Revised Statutes.

Dated at Portland, Oregon, January 19th, 1910.

(S.) WM. B. GILBERT,
Circuit Judge.

By A. L. RICHARDSON,
Clerk, upon authority of telegram from Judge Gilbert, dated Portland, Oregon, Jan. 19th, 1910.

(Endorsed:) Filed Jan. 19, 1910. A. L. Richardson, clerk.

82 *Writ of error from the Supreme Court of the United States to the District Court of the United States for the District of Idaho.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the District Court of the United States for the District of Idaho, greeting:

Because in the record, decisions, and proceedings which is in said District Court before you between the United States of America, plaintiff, and James T. Barber, Sumner G. Moon, and other defendants, a manifest error has happened, to the great damage of the United States of America. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same in said Supreme Court, at Washington, within thirty days from the date hereof. That the records and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error

what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the nineteenth day of January, in the year of our Lord one thousand nine hundred and ten.

[SEAL.] A. L. RICHARDSON,
Clerk of the Circuit Court of the United States for the District of Idaho.

Allowed by—
WILLIAM B. GILBERT, *Circuit Judge.*

(Indorsed:) No. 451. In the District Court of the *Uni*United States within and for the District of Idaho, central division. The United States of America, plaintiff, vs. Sumner G. Moon, James T. Barber, et al., defendants. Writ of error. Filed Jan. 19, 1910. A. L. Richardson, clerk.

84 THE UNITED STATES OF AMERICA, *District of Idaho, ss:*

To James T. Barber, Sumner G. Moon et al., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the 21st day of February next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the District of Idaho, wherein The United States of America is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment and decision rendered against the said plaintiff in error as in the said writ mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Portland, in the circuit above named, this 22nd day of January, in the year of our Lord one thousand nine hundred and ten.

WM. B. GILBERT,
Circuit Judge.

Attest—
[SEAL.] A. L. RICHARDSON, *Clerk.*

Service of the foregoing citation acknowledged this day of , 1910.

Attorneys for Defendants in Error.

UNITED STATES OF AMERICA, *District of Idaho, ss:*

I hereby certify that I received the within citation on January 28, 1910, and served the same as to the defendants, James T. Barber and Sumner G. Moon, by delivering to and leaving with A. A. Fraser, their attorney of record, a true copy of the within writ and citation on January 28, 1910, at Boise, Idaho.

S. L. HODGIN, *U. S. Marshal.*
By E. W. BEEMER, *Deputy.*

BOISE, IDAHO, *Jan. 28, 1910.*

(Indorsed:) No. 451. United States Circuit Court, District of Idaho. The United States of America, plaintiff in error, vs. James T.

Barber, Sumner G. Moon et al., defendants in error. Citation on writ of error. Filed on return this 28th day of January, 1910. A. L. Richardson, clerk. H. 203 Civ., 1/28–10.

85 *Return to writ of error.*

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the Supreme Court of the United States, and the same is transmitted accordingly.

Attest:

[SEAL.] A. L. RICHARDSON, *Clerk.*

86 *Clerk's certificate.*

In the United States District Court, District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
JAMES T. BARBER, SUMNER G. MOON, FRANK MARTIN, AND ALBERT E. PALMER, defendants in error.

I, A. L. Richardson, clerk of the District Court of the United States, in and for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 86, inclusive, to be full, true, and correct copies of the pleadings and proceedings in the above-entitled cause and that the same together constitute the transcript of the record herein upon writ of error to the Supreme Court of the United States.

Witness my hand and the seal of said court affixed at Boise, Idaho, this 7th day of February, 1910.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Indorsed:) Office of the clerk. Received Feb. 15, 1910. Supreme Court U. S.

(Indorsed:) File No. 22024. Idaho D. C. U. S. Term No. 798. The United States, plaintiff in error, vs. James T. Barber, Sumner G. Moon, et al. Filed February 16, 1910. File No. 22024.

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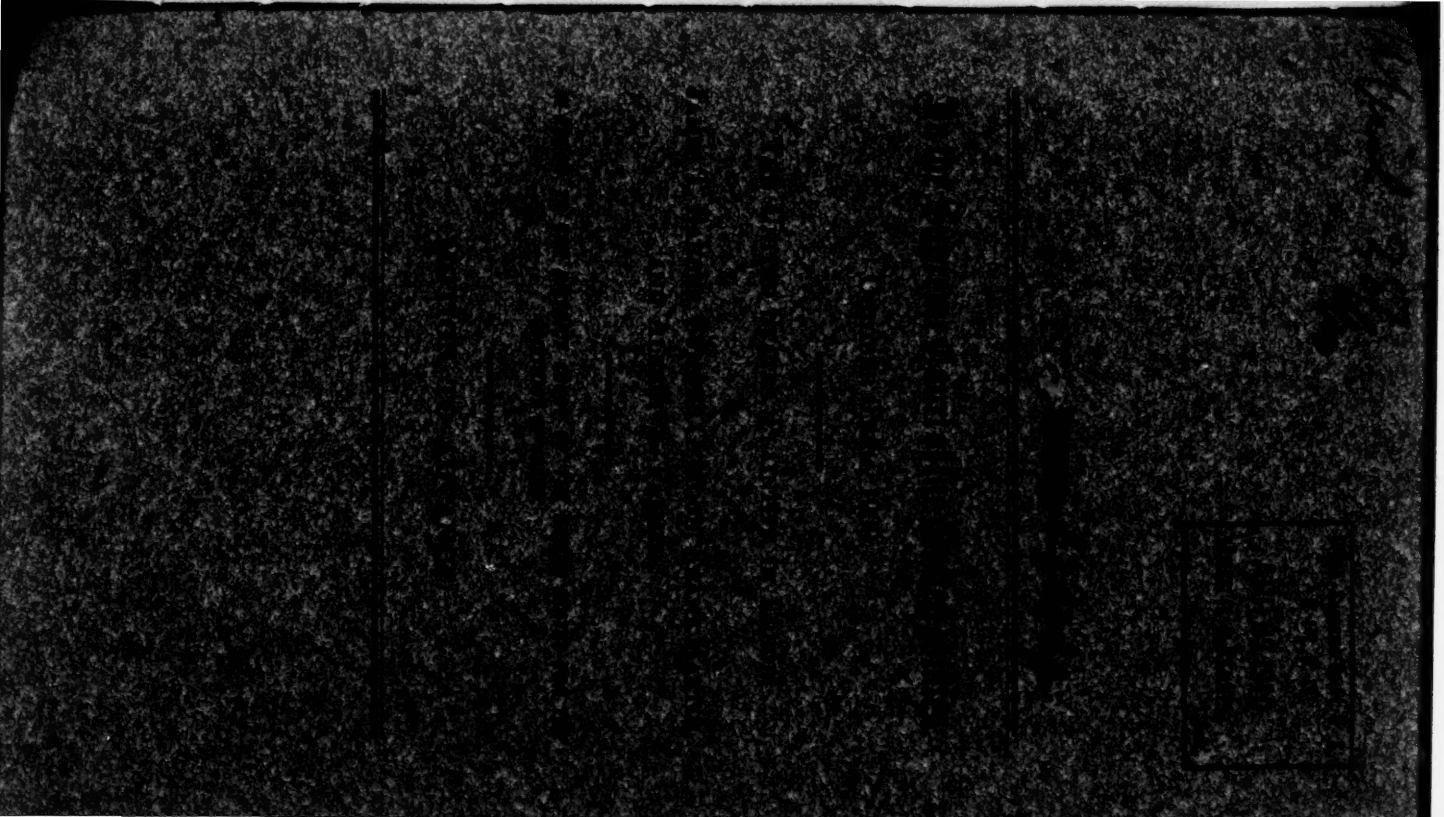

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN error,
v.
JAMES T. BARBER, SUMNER G. MOON, Frank Martin, and Albert E. Palmer.
No. 798.

MOTION TO ADVANCE.

The defendants in error were indicted in the District Court of the United States for the District of Idaho on April 14, 1908, for conspiring, with other persons, to defraud the United States out of the possession and use of and title to certain large tracts of timber land in the State of Idaho by soliciting, inducing, and procuring a large number of persons to apply for and enter said lands upon an agreement and understanding that the title thereto, when acquired, should inure to the use and benefit of the defendants and others.

There were four counts in the indictment, to each of which demurrers and pleas (called "pleas in abatement") setting up the statute of limita-

tions (sec. 1044 R. S.) were filed on behalf of the defendants Barber and Moon. The indictment was dismissed as against defendant Martin, and the first three counts thereof were dismissed as against Barber and Moon. The record is silent as to any service upon defendant Palmer.

The pleas to the fourth count were sustained and the present writ of error was sued out under the criminal appeals act; and in accordance with the provision of that act giving precedence in such cases the Solicitor-General moves the court to advance the case on the docket for hearing at the next term.

Notice of this motion has been served upon opposing counsel.

LLOYD W. BOWERS,
Solicitor-General.

APRIL, 1910.

In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN error,
v.
JAMES T. BARBER, SUMNER G. MOON et al.
No. 444.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

James T. Barber, Sumner G. Moon, Frank Martin, and Albert E. Palmer were indicted, with others, for a conspiracy to defraud the United States out of the possession and use of a number of tracts of timber land situated in the county of Boise, State of Idaho. No disposition of the case is made as to Palmer, and it may be inferred that he is not under arrest. The case was dismissed as to defendant Martin. (Rec., p. 43.)

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The indictment contains four counts, all of which relate to the same conspiracy, but in the fourth count, not only is the conspiracy described in detail, but the character and date of each overt act are fully set forth. (Rec., pp. 14–27.) Defendants Barber and Moon filed a demurrer to the entire indictment, specifying as grounds (1) that the indictment does not state facts sufficient to constitute a public offense; (2) that the facts stated in the indictment do not constitute any violation of the Constitution or laws of the United States; and (3) that the indictment shows upon its face that the action is barred by the provisions of section 1044 of the Revised Statutes of the United States. (Rec., p. 35.) In the same demurrer they set forth grounds directed against each of the first three counts, which need not be stated, as a *nolle prosequi* was subsequently entered as to these counts. (Rec., pp. 35 and 45.)

On December 15, 1909, these defendants filed a separate demurrer to the fourth count, on the ground that it does not state sufficient facts to constitute an offense against or under the laws of the United States. (Rec., p. 36.) On December 16, 1909, each of the defendants, Barber and Moon, filed what is denominated a plea in abatement to the indictment, on the ground that the prosecution had been barred by the statute of limitation when the indictment was found, the allegations of the plea being in the following language:

> Because, he says, the indictment was found and filed on the 14th day of April, 1908, and

that said indictment was not found or filed or information instituted in the proper or any other court within three years after the commission of the offenses in said counts of said indictment specified, and because, he says, the offense is barred as to each count by the provisions of section 1044 of the Revised Statutes of the United States of America, in this, that more than three years have elapsed between the date of the commission of the alleged crime charged in each of said counts and the date of the finding of said indictment; and in this behalf the defendant, James T. Barber, alleges that during all of said times between the commission of said alleged crime, to wit, the 1st day of September, 1901, up to the present date, and the filing of this plea, this defendant, the said James T. Barber, was a citizen and resident of the county of Eau Claire, in the State of Wisconsin, and did have his home and usual and well-known place of abode at Eau Claire, in the county of Eau Claire, State of Wisconsin, and was at all times subject to process of this court, and at no time during this period of time was he, the said James T. Barber, a fugitive from justice, or was he fleeing from justice, and that the said James T. Barber did not at any time between the dates of the commission of the offense alleged and charged in each of the counts, as aforesaid, and the finding of said indictment, leave his home and well-known place of abode in the city of Eau Claire, Wis., with intent to avoid detection or punishment

> for any public offense against the United States or at all. (Rec., pp. 37, 38.)

On December 16, 1909, the United States filed demurrers to these pleas in so far as they applied to the fourth count, stating as grounds therefor that the matters contained therein—

> are not sufficient in law to bar or preclude the said United States from prosecuting the said fourth count of the said indictment against him, the said James T. Barber, and that the said United States is not bound by law to answer the same; and this the said A. B. Jackson and Peyton Gordon, who prosecute as aforesaid, are ready to verify.
>
> Wherefore, for want of sufficient plea in this behalf, the said A. B. Jackson and Peyton Gordon, for the said United States, pray judgment, and that the said James T. Barber may be convicted of the premises of the said indictment specified. (Rec., pp. 39, 40.)

As bearing on the demurrers to the so-called pleas in abatement, it was agreed in a written stipulation that certain matters which were equivalent to allegations that defendants had not been fugitives from justice might be treated as having been incorporated in the plea. (Rec., pp. 40, 41.)

With the pleadings in this shape, after argument, on December 21, 1909, the court entered the following order:

> Now came the attorneys for the respective parties herein, and thereupon the demurrer to the third count in the indictment herein is

withdrawn by the defendants. The demurrer to the second count of the indictment is confessed by complainant, and it is ordered that the demurrer and plea in abatement to the first count of the indictment be, and is hereby, overruled and denied. *It is further ordered that plea in abatement to the fourth count of the indictment be, and is hereby, sustained.* Thereupon counsel for the Government moved and asked that the three first counts of the indictment in the above-entitled action be nollied; thereupon said motion was granted and the cause dismissed; all in accordance with the direction of Hon. Robert S. Bean, district judge, who heretofore heard and took under advisement said demurrer and plea in abatement. (Rec., p. 45).

The United States thereupon filed the following assignments of error:

First. The District Court of the United States for the District of Idaho erred in sustaining the pleas of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment.

Second. The said district court erred in dismissing said cause.

Third. That said district court erred in overruling the demurrers interposed by the plaintiff to the pleas of the defendants James T. Barber and Sumner G. Moon.

Fourth. That the said district court erred in not overruling the pleas of the defendants James T. Barber and Sumner G. Moon. (Rec., p. 47.)

To reverse the action of the court with reference to the fourth count in the indictment, the cause has been removed by writ of error to this court.

ARGUMENT.

I.

This case falls within the provision of the act of March 2, 1907 (ch. 2564, 34 Stat., 1246), which provides for writs of error to this court in certain instances in criminal cases.

The third class of judgments which it is provided by said act may be removed to this court by writ of error are those "sustaining a special plea in bar when the defendant has not been put in jeopardy," but it contains no provision authorizing a review of a judgment sustaining a plea in abatement.

However, a plea of the statute of limitation is one in bar and not in abatement.

In 12 Cyc., 355, in defining a plea in abatement, it is said:

> Any defect apparent on the face of the indictment, or founded on matter extrinsic of the record, *rendering the indictment insufficient,* may be made the ground of a plea in abatement, and if found for defendant will abate the indictment.

And in the same volume, page 362, in paragraph (d) under "*Special pleas in bar,*" is discussed the plea of limitation.

Bouvier (Rawle's Revision, vol. 1, p. 5) defines abatement "In pleading at law" as—

> The overthrow of an action caused by the defendant pleading some matter of fact tending to impeach the correctness of the writ or declaration, defeats the action for the present, but does not debar the plaintiff from recommencing it in a better way.

In 1 Bish. New Crim. Proc., section 799, the plea of the statute of limitation is treated as a plea in bar; and from his definition of a plea in abatement (sec. 738) such a plea could not possibly be so classified.

But citation of authorities is unnecessary, as the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant, the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both civil and criminal procedure, as a plea in bar and not one in abatement. Consequently, the designation of this document as a plea in abatement no more changed its nature than it would change the nature of an indictment for murder to designate it as a bill in equity.

The defendant, therefore, claims his discharge under a judgment sustaining this special plea in bar; and it is a judgment that the act of March 2, 1907, expresssly permits to be reviewed by this court at the instance of the United States.

II.

The demurrer to the plea should have been sustained.

While the record is in an awkward condition, yet it shows with sufficient clearness what action was in fact taken by the court below. Technically, there should have been a judgment overruling the demurrer to the plea, then an issue on the allegations of the plea, a trial of the question of fact thus presented, a finding in favor of defendants, and a judgment sustaining the plea. But here the whole matter was argued, considered, and determined together, and the judgment "that the plea in abatement to the fourth count of the indictment be, and is hereby, sustained," was necessarily a judgment sustaining it as against the attack by demurrer, as well as upon the questions presented in the plea itself; and there is before this court every question relating to the validity and sufficiency of the plea which was before the court below.

The demurrer to the plea should have been sustained upon the following grounds:

First. *A special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue.*

This question is fully discussed in section 1, subsection A, of the Solicitor-General's brief and argument in cause No. 390, *United States* v. *Gustav E. Kissel*, and reference is made thereto without repeating the same here.

Second. *The plea is bad in form in that it does not confess the allegations of the indictment.*

In 12 Cyc., 361, under "*Special pleas in bar,*" it is said:

> In a criminal prosecution defendant may and should plead specially in bar any matter in *confession and avoidance* constituting a defense and not admissible under a plea of not guilty.

And in the same connection it is said that—

> by the weight of authority a special plea setting up a defense which is admissible under the plea of not guilty is bad and should be stricken out, unless the objection is waived by the State.

In Bouvier (Rawle's Revision, vol. 2, p. 679), with reference to pleas at law, it is said:

> Special pleas in bar *admit the facts alleged in the declaration,* but avoid the action which the plaintiff would not be bound to prove or dispute in the first instance on the general issue.

Therefore, according to these authorities, if a defendant chooses to present his defense of the statute of limitation by way of a special plea instead of under the general issue, if permissible at all, he must confess the allegations of the indictment.

The various phases of this question are fully discussed in section 1, subsection B, of the Solicitor-General's brief in the *Kissel* case, to which reference is here made.

III.

The judgment sustaining the plea should be reversed, because no replication was filed to the plea, nor was any judgment by default taken thereon, and no evidence was introduced or offered to sustain the allegations thereof.

The record shows that there was no trial of the questions of fact presented by the plea. Manifestly, the court determined the sufficiency of the plea from the facts alleged in the indictment. But, if those allegations were not confessed by the plea, how could they be considered as evidence, or looked to in any way in determining whether the plea should be sustained? Moreover, the Government is not bound by those allegations, but may prove that the conspiracy was formed on an entirely different date from the one therein alleged.

The defendants have sought to dispose of the case in this summary manner by filing a special plea stating that they committed the offense, but that it was done more than three years before the finding of the indictment, and ask that that question be disposed of before the merits be gone into. Now, whatever the rule may be with reference to the burden of proof to show when an offense was committed when a trial is being had upon the merits, it is obvious that upon a preliminary hearing on this plea, invoked by defendants, the burden rests upon them to prove the affirmative allegations contained therein, and that in the absence of all proof their plea must fail.

IV.

The offense, as charged in the fourth count of the indictment, was not barred by the statute of limitation when the indictment was found.

As above stated, the court below manifestly based his judgment that the plea of the statute of limitation should be sustained on the facts as set out in the indictment, and the Government insists that in so holding on those facts he committed error.

The plan of the conspiracy charged and the overt acts committed in pursuance thereof were as follows:

The conspiracy was formed by the defendants and their coconspirators to obtain for themselves and the Barber Lumber Company, a corporation to be thereafter organized, and which was subsequently organized under the laws of Wisconsin, the title to the lands described in the indictment. This was to be accomplished by inducing and procuring a large number of persons to apply for and enter these lands under the laws relating to the purchase and sale of timber lands of the United States, with an agreement made prior to the first application to enter, with each of said persons, that the title to the land acquired by the entry should inure to the use and benefit of the conspirators and the said corporation. The conspirators were to point out to and select for the applicants the land which they were to apply to enter, and furnish them descriptions of the same, and to prepare the necessary papers to be filed with the United States land office at Boise, and were to represent and

defend them in all proceedings before the land office relating to the entering and purchase of the lands; and, if necessary, were to furnish the entrymen with the money necessary to make final proof and to purchase the lands from the United States, and prepare all the necessary deeds to convey the title to the lands, when acquired, to the defendants and to the said corporation, or such persons as they might designate to hold the title for the use of said corporation; and were to pay all expenses incident to the execution and filing and recording of such conveyances.

The overt acts alleged to have been committed "in furtherance, continuance, and renewal" of this conspiracy were as follows:

(1) The conspirators solicited, induced, and procured sixty-eight persons (naming them) to make application at the land office in Boise, to purchase certain portions of the lands described in the indictment, and to execute and verify before the proper officers of the land office the preliminary affidavits required by law. A memorandum showing the numbers of these affidavits, the date of their filing, the date of the final proofs, and a description of the land described in each application is set forth in this count, and it appears therefrom that these applications were made, the first on August 17, 1901, and the last on June 8, 1904, and the remainder at various times between these dates.

(2) The conspirators subsequently solicited, induced, and procured these same parties to make final

proofs and payments for the land applied for by them; and the said memorandum shows that these final proofs were made, the first, November 13, 1901, and the last, September 20, 1904, and the remainder at various times between said dates.

(3) Thereafter, the dates of the conveyances not being given, the conspirators solicited, induced, and procured the persons mentioned to convey their interests in and title to the lands thus procured by them, to either Albert E. Palmer, George S. Long, or Horace S. Rand.

(4) On April 10, 1905 (the indictment was returned April 14, 1908), the defendants solicited, induced, and procured George S. Long to execute a deed conveying to the Barber Lumber Company his title and interest to a number of tracts (each being described), which he had procured in the manner above stated.

(5) On April 15, 1905, defendants procured the registration of the aforesaid deed.

(6) On May 27, 1905, Albert E. Palmer, with the knowledge and at the request of his codefendants, executed a deed conveying to the Barber Lumber Company the title to a large number of tracts (the description of each being given), which had been obtained in the manner shown.

(7) On the 28th day of June, 1905, Albert E. Palmer, with the knowledge and at the request of his codefendants, conveyed to said Barber Lumber Company the title to another one of said tracts which is particularly described.

(8) On January 2, 1906, Albert E. Palmer, with the knowledge and at the request of his codefendants, conveyed to the said lumber company the title to yet another of said tracts, the description of which is given.

(9) On the 5th day of July, 1905, the defendants procured the registration of the deed executed by Albert E. Palmer on June 28, 1905, and on February 2, 1907, they procured the registration of the deed executed by Palmer on January 2, 1906.

(10) On May 22, 1905, defendants solicited, induced, and procured L. G. Chapman, manager of the Barber Lumber Company, to write H. S. Rand, at Burlington, Iowa, the following letter:

> DEAR SIR: We inclose herewith quitclaim deed covering lands on the Boise River which have been purchased in your name. Will you kindly execute the same and have it executed by Mrs. Rand and return it to us at your convenience.

(11) On July 27, 1905, defendants received and accepted the deed executed by said H. S. Rand, which conveyed to the Barber Lumber Company the title to a large number of the tracts which had been procured under the conspiracy, and a particular description of which is set forth.

In the beginning of the count, the date or dates of the conspiracy is alleged to have been—

> on the first day of September, in the year nineteen hundred and one, and at the time of

> the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and the day of the presenting and filing of this indictment;

and each overt act is alleged to have been done "in furtherance, continuance, and renewal" of the conspiracy.

The facts set forth in said count of the indictment show that the prosecution is not barred, because:

1. *Overt acts were committed within three years before the filing of the indictment.*

Whether or not an overt act committed in furtherance of a conspiracy within the statutory period of limitation prevented a bar of a criminal action brought under section 5440 of the Revised Statutes, was for a time a question of dispute among Federal judges, but at present a very great weight of authority of the lower courts favors the rule that such overt act prevents a bar.

In *Callan* v. *Wilson* (127 U. S., 555) this court, quoting from *Commonwealth* v. *Hunt* (4 Met., 111, 121), said:

> The general rule of the common law is, that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual.

In Wright's Criminal Conspiracies, page 124, it is said:

> The conspiracy itself is the crime. It is different from an indictment for stealing, or an action for trespass, where the offense consists of an act done. The devising of means is not a constituent part of the offense, but an act done in pursuance of the original design. *It is not the actual perpetration but the original hatching of the plot which constitutes the offense.*

The rule at common law, therefore, is that no overt act is necessary before there can be a prosecution for the crime.

Section 5440, Revised Statutes, provides that if two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, *and one or more of such parties do any act to effect the object of the conspiracy,* all the parties to such conspiracy shall be liable to a penalty, etc. Therefore, by positive provision of the statute, an overt act committed by one of the coconspirators is a necessary prerequisite to a criminal prosecution; but the purpose and effect of the provision requiring the commission of an overt act was thus stated by this court in *United States* v. *Britton* (108 U. S., 193, 204–205), in the following language:

> This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, *but of the conspiracy alone.* The provision of the statute that there

> must be an act done to effect the object of the conspiracy merely affords a *locus penitentiæ*, so that before the act is done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute.

This language has been repeatedly quoted with approval by this court and other courts.

Since, therefore, it is the original confederating and combining together, by concerted means, or, in other words, *the hatching of the plot*, which constitutes the offense, and the overt act as required by the Federal statute is not a part thereof, the conspiracy—that is, *the offense itself*—is precisely the same at both common law and under this statute, *the statute requiring only a prerequisite to a prosecution for the offense* which did not exist at common law.

The rule with reference to the common-law conspiracy is that an overt act committed by one of the conspirators is conclusive evidence of a renewal or a continuance of the conspiracy at that date, and, consequently, that the prosecution may be maintained at any time within the statutory period thereafter. This rule is laid down with probably as much clearness as elsewhere in *People* v. *Mather* (4 Wendell, 259) in the following language:

> If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another

> county to execute their plans of mischief and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. *The law considers that wherever they act, there they renew, or, perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design.*

To the same effect see *Commonwealth* v. *Barkilson* (85 Pa., 482, 488, 490), *Ochs* v. *People* (124 Ill., 429), *Amer. Fire Ins. Co.* v. *State* (Miss.), (22 South, 99, 102, 103).

In the Federal courts in the following cases, an opposite view was maintained:

United States v. *Owen*, decided by District Judge Deady (32 Fed., 534); *United States* v. *M'Cord*, charge to the jury by District Judge Bunn (72 Fed., 159, 165); *Ex parte Black*, opinion by District Judge Quarles on removal proceedings (147 Fed., 832). From the decision in *Ex parte Black*, appeal was taken to the Circuit Court of Appeals for the Seventh Circuit, where it was affirmed, but on another ground, to wit, that the overt act alleged to have occurred within three years before the finding of the indictment, was not done to effect the object of the conspiracy (160 Fed., 431, 435).

The principle that an overt act renews or continues the conspiracy, and that a prosecution may be maintained within three years after the commis-

sion of the last overt act, has been maintained by the district and circuit courts in the following cases:

United States v. *Green* (115 Fed., 343, 355), opinion by Judge Speer.

United States v. *Bradford* (148 Fed., 413, 417, 419), opinion by Judge Parlange.

United States v. *Brace* (149 Fed., 874, 876, 877), opinion by Judge Hill.

United States v. *Barber* (157 Fed., 889), opinion by Judge Quarles. This case is the one now at bar, being presented to Judge Quarles on the question of removal, and the holding of the court was contrary to his opinion in the case of *Ex parte Black*. This change of view was caused by the decision of the Court of Appeals in his circuit, wherein they held to the contrary in a case hereinafter cited.

United States v. *Raley* (173 Fed., 159, 165, 166), opinion by Judge Wolverton.

United States v. *Breese* (173 Fed., 402, 411), charge to the jury by District Judge Newman.

The Courts of Appeals have taken this view in the following cases:

The Court of Appeals of the District of Columbia in *Lorenz* v. *United States* (24 Ap. D. C., 337, 387, 388).

The Circuit Court of Appeals for the Fifth Circuit in *Bradford* v. *United States* (152 Fed., 617).

The Circuit Court of Appeals for the Eighth Circuit in *Ware* v. *United States* (154 Fed., 577, 579, 580). In this case the reasoning of the court upon this question is as follows:

The offense, under section 5440, is the conspiracy, not the conspiracy and the overt act. "The provision of the statute," says the Supreme Court, "that there must be an act done to effect the object of the conspiracy merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute." (*U. S.* v. *Britton*, 108 U. S., 199, 205, 2 Sup. Ct., 525, 27 L. Ed., 703.) So that there is a locus penitentiæ after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and if the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy, without the conscious participation of the defendant ought not to charge, and can not charge, him with the offense, because they fail to evidence his intent to violate the law within the three years.

On the other hand, the offense denounced by section 5440 is not the mere formation, but the existence, of the conspiracy and its execution. And if by the agreement, or by the joint assent of the defendant and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired

> and had wrought to accomplish the same or a like purpose more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

The Circuit Court of Appeals for the Ninth Circuit, in *Jones* v. *United States* (162 Fed., 417, 425, 427). In this case the court, in considering the authorities holding that an overt act committed within three years would not prevent the bar of the statute, said:

> If the conspiracy in question contemplated but the one overt act, that would undoubtedly be so. But we think it equally plain that where, as in the present case, the alleged conspiracy contemplated various overt acts, and the consequent continuance of the conspiracy beyond the commission of the first one, then each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime.

And, after a very apt illustration, the court continues:

> So, in the case at bar, the conspiracy alleged contemplated the commission of various overt acts. It was a continuing conspiracy, and so long as the conspirators continued in pursuance of it, and did not avail themselves of the locus penitentiæ that section 5440 of the Revised Statutes afforded them, every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime.

It does not appear that any United States appellate court has taken a view contrary to these authorities.

2. *The overt acts alleged to have been committed within three years before the finding of the indictment were committed in furtherance and to effect the object of the conspiracy.*

As shown from the allegations of the indictment, as above set forth, the plan and scope of the conspiracy was to obtain title in the manner described from the United States, and procure the vesting of the same, by the method described, in the conspirators or in a corporation that should thereafter be formed and designated by them. It is true that the illegality of the agreement or conspiracy resulted from the intent to defraud the United States; but the agreement or conspiracy can not be split in two, but must be taken as a whole, and every step taken by each of the conspirators to further the object of the preliminary agreement entered into was clearly done in furtherance of and to carry into effect the entire scheme. Therefore the execution of the conveyances of the land acquired by the various entrymen, or the execution of a deed for such land by the vendees of such entrymen, when made at the instigation of the conspirators and as a part of the scheme as originally formulated, is just as much in furtherance of the conspiracy or plan, and was just as essential to its consummation, as was the filing of the original entries or final proofs and the procurement of title from the United States.

It is true the United States was defrauded when title passed from it to the several entrymen, but this was only a part of the general fraudulent scheme, which was not only to defraud the Government but to benefit the conspirators, and any material overt act which had for its object the benefit of the conspirators or of a corporation organized at their instance, or designated by them, was, under the authorities, conclusive evidence of a continuation or renewal of the original plot to defraud the Government and to acquire the lands for the conspirators.

In 157 Fed., 80, 89, as above shown, this case came before Judge Quarles on the question of removal, and the accused there took the position that the indictment did not upon its face show such probable cause as justified an order of removal, but the learned judge held that the overt acts alleged in the indictment were sufficient to renew or continue the conspiracy and prevented a bar of the action.

It is insisted, therefore, that the judgment of the court below should be reversed, and this case be remanded for trial.

J. A. FOWLER,
Assistant Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JAMES T. BARBER, SUMNER G. MOON, et al. } No. 444.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

SUPPLEMENTAL BRIEF ON BEHALF OF THE UNITED STATES.

I.

This court has jurisdiction of the case.

Appellee in his reply brief does not seriously contest the contention that the plea of the statute of limitations is ordinarily a plea in bar and not a plea in abatement, but he insists that this case should be an exception to the general rule because:

First. *The plea was treated by the parties and by the court below as a plea in abatement.*

This, however, can not alter or change the nature of the plea. The effect of sustaining the plea was precisely the same as if it had been properly designated

a plea in bar. There was no agreement between the parties that it might be treated as a plea in abatement; and as it is, in fact, a plea in bar, it is doubtful whether the court should or could treat it as a plea in abatement, though a positive agreement to that effect had been entered into between counsel. The jurisdiction of this court to review this case is expressly given by act of Congress, and it can not be deprived of its jurisdiction by agreement of counsel.

Second. *Under section 5440, Revised Statutes, it is necessary to allege an overt act.*

It can not be perceived how the fact that it is essential under this section to allege the commission of an overt act in pursuance of the conspiracy can alter the nature of the plea of the statute of limitations. In an indictment for conspiracy at common law it is unnecessary to allege an overt act, and in such cases the statute of limitations begins to run from the date of the offense.

Against an offense committed under section 5440 the statute of limitations does not run from the formation of the conspiracy but from the commission of the overt act, because no prosecution can be had until such event occurs. But when the three years have expired after the commission of the overt act (not considering here the effect of a subsequent overt act) the prosecution is barred; and the effect is precisely the same as where the statute runs from the commission of the offense, that is, not merely are the proceedings subject to abatement, but the Govern-

ment's right of prosecution is destroyed, and the accused is no more liable to punishment than if he had never committed the offense.

Inasmuch as a demurrer was interposed by defendants to the fourth count of the indictment (R., p. 36) and as the court below decided the case upon the sufficiency of the indictment, precisely the same as if a demurrer raising the question of the bar of the statute were permissible and was sustained, the case will be here treated in like manner.

II.

It was error for the court below to hold that the object of the conspiracy alleged in the indictment was accomplished when the title to the lands described in the indictment was divested out of the United States, and that no overt act thereafter committed was in furtherance of any unlawful object embraced in the conspiracy.

To determine the correctness of the court's ruling upon this question, it is necessary to fully understand the scope of the conspiracy and the nature of the overt acts alleged in the fourth count of the indictment. It is therein alleged that the defendants conspired with certain other persons—

> * * * knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States * * * with the intent and purpose unlawfully *to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be*

> *organized, and organized, to wit, the Barber Lumber Company,* a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, with an office and agent at the city of Boise in the said State *and ultimately to obtain the transfer of the title to said lands to said corporation, by unlawfully, willfully, and corruptly soliciting, inducing, and procuring a large number of persons to apply for and enter said lands under the laws of the United States relating to the purchase and sale of the public timber lands of the United States * * * for the use and benefit of said James T. Barber, Summer G. Moon, Frank Martin, Albert E. Palmer, Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, and Patrick Downs, and said corporation.*

And the methods by which the object of the conspiracy was to be accomplished are fully described.

And it is alleged that in furtherance of the conspiracy the eleven overt acts, described in the indictment, were committed.

The first two of these overt acts consisted in procuring a large number of persons, whose names are given, to make applications for various tracts of land and final proofs therefor, but it appears that neither the applications nor proofs mentioned in the indictment (R., p. 18–21) were made within three years before April 14, 1908, the day upon which the indictment was filed.

The third overt act alleged really consisted of numerous overt acts. It is there alleged that the

conspirators unlawfully solicited, induced, and procured the various persons mentioned to convey either to Albert E. Palmer, or George S. Long, or Horace S. Rand all their interests in and title to the lands theretofore described. Of course the execution of a conveyance by each separate individual was within itself an overt act.

It is important to note that no date whatever is given as to when either of these conveyances was executed; that is, when these several overt acts were committed. Consequently the indictment fails to show on its face whether they were or were not committed within the three years next before the finding of the indictment.

It was assumed by counsel in argument that the phrase "thereafter, to wit, on the tenth day of April in the year nineteen hundred and five," used in alleging the next succeeding overt act shows that these conveyances were executed before that date. This assumption is erroneous. The word "thereafter" refers to the formation of the conspiracy, and not to the commission of the overt act next before alleged. The same expression is used in describing each overt act; and it will be noted that the ninth overt act is alleged to have been committed on July 5, 1905, while the date of the eighth was January 2, 1906, and a similar relation exists between the ninth and tenth overt acts.

As to the fourth overt act, it is alleged that on the 10th day of April, 1905, the conspirators induced George S. Long to execute and deliver a deed of conveyance to the Barber Lumber Company for a num-

ber of quarter and half sections, which are particularly described. This occurred three years and four days before the finding of the indictment; and it may be assumed that the deeds from the parties who conveyed the lands entered by them to Long were executed prior to that date.

As to the fifth overt act, it is alleged that on the *27th day of May, 1905*, the conspirators induced Albert E. Palmer to convey to the Barber Lumber Company numerous tracts of land, which appear by a comparison with the list of tracts previously set out in the indictment to have been tracts that had been entered by various parties under the conspiracy alleged.

As to the sixth overt act, it is alleged that a conveyance at the instance of the conspirators was executed by Palmer to the Barber Lumber Company on the *28th day of June, 1905*, for a few additional tracts of land which had also been entered under the conspiracy.

As to the seventh overt act, it is alleged that a conveyance was executed by Palmer on *January 2, 1906*, at the instance of the conspirators for a few other tracts that had been entered under the conspiracy.

As to the tenth overt act, it is alleged that on *July 7, 1905*, at the instance of the conspirators, Horace S. Rand executed a conveyance to the Barber Lumber Company for certain tracts of land which had previously been fraudulently entered

under the conspiracy, the total acreage being 15,496.65 acres.

It therefore appears in the face of the indictment that the titles to the lands which had been previously conveyed by the fraudulent enterers to Albert E. Palmer and Horace S. Rand were transferred by them to the Barber Lumber Company within *three years before the finding of the indictment. And, furthermore, there is nothing in the indictment which shows that the title had been divested out of the several entrymen who executed the conveyances to Palmer and Rand before April 14, 1905.*

Consequently, under this record, it must be treated as if such interests in these lands as had been acquired by the several entrymen, who subsequently conveyed them to Palmer and Rand, remained in them up to a time within three years before the finding of the indictment.

Therefore the question is whether the execution of the numerous conveyances, by the several fraudulent entrymen, to Palmer and Rand, by which the titles to these lands were vested in two individuals, were in furtherance of the unlawful conspiracy, and further whether the conveyances subsequently executed by Palmer and Rand to the Barber Lumber Company, by which they were further united by being vested in one individual, were likewise in furtherance of such conspiracy.

The court below held that the "Object of the conspiracy charged was to defraud the United States out of its land. This was accomplished when the

title passed from the Government. The subsequent conveyances from successors in interest of the entrymen to the Barber Lumber Company could not, by any possibility, have been done to effect the object of the original conspiracy" (memorandum Op.).

In this holding it is submitted that the court took an entirely erroneous view of the statute upon which this indictment rests, one which has been expressly repudiated by this court. The nature of a conspiracy of this character, and in what the fraud against the Government consists, and whether such a conspiracy to defraud is a criminal offense, was fully considered by this court in the case of *United States* v. *Keitel* (211 U. S., 370); and it is submitted that the principles decided in that case conclusively determine that the conclusion reached by the court below in this case is incorrect.

The *Keitel* case involved the fraudulent procuring of title to certain coal lands under sections 2348, 2349, 2310, Revised Statutes. By those sections more than one entry by the same person or association of persons was prohibited.

The indictment in the present case was found under the Timber and Stone Act of June 3, 1878 (Chap. 151, 20 Stat., 89), as amended by the act of August 4, 1892 (Chap. 375, 27 Stat., 348), which reads as follows:

> That surveyed public lands of the United States valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be

> sold to citizens of the United States, or persons who have declared their intention to become such, *in quantities not exceeding one hundred and sixty acres to any one person or association of persons* at the minimum price of two dollars and fifty cents per acre.

The second section provides that the person desiring to avail himself of the provisions of the act shall file with the register a written statement, which among other things must state—

> * * * that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void.

Therefore the statutes upon which the two cases were predicated are in effect the same.

While the indictments in the two cases differ somewhat in form, yet in substance they are the same. In the *Keitel* indictment, after alleging that the defendants conspired to make false and fictitious entries and to make fraudulent representations to the registrar of the land office, and to deceitfully cause him and the Commissioner of the Land Office to act otherwise than they would, had they not been deceived, and to furnish entrymen with money necessary to make the payments required, it was further charged that—

> * * * thereby the said defendants unlawfully, corruptly, willfully, and knowingly did conspire, combine, confederate, and agree together, and with their said agents, and said divers other persons to the grand jurors unknown, by means of said false, fictitious, illegal, feigned, untrue, forged, and fraudulent entries and filings hereinabove referred to, indirectly, deceitfully, and fraudulently *to obtain for themselves and the said corporation from the said United States certain of the public lands and property of the said United States above referred to, in quantity greatly in excess of that which either or any or all of the said defendants and said corporation would lawfully be allowed to obtain directly from the United States under a lawful administration of the said laws and regulations and by means of legal and valid entries of said lands, and in that manner to defraud the said United States of*

> *its valuable property in such lands, and also of its governmental function in the matter of preserving and disposing of the said lands, as well as out of its right to administer an intelligent and honest service in that behalf in the interests of the people of the said United States.*

It is true that the manner in which the United States would be defrauded by the acquiring of title by the conspirators is described a little more fully in this indictment than in the indictment in the case at bar, but the variance is wholly immaterial, as will be made to appear in the development of the argument, and, moreover, the case is not here on the sufficiency of the indictment in this particular, and the question will not be considered by this court. What this court considered as the essential features of the indictment in the *Keitel* case, and wherein the conspiracy therein described was unlawful, is stated with clearness and force in the opinion of the court, the most important parts of which are as follows:

> * * * The first count charged that the eleven defendants illegally conspired, in violation of section 5440, Revised Statutes, with certain named persons and others unknown *to illegally obtain the title of certain coal lands belonging to the United States.* The conspiracy was to be effected by procuring various persons as agents to enter coal lands in their own name, ostensibly for their own benefit but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the ac-

cused or the corporation *and under agreements to convey the title, when acquired, to the accused or to the corporation, thus enabling the accused and the corporation to obtain coal lands belonging to the United States in excess of the quantity which they were allowed by law to enter.*

* * * * *

Under these sections the question is, Do they prohibit a person who is disqualified from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one, who would be qualified if he made any entry of coal land, in his own behalf, to make such entry ostensibly for himself but really as agent for the disqualified principal to pay for the land with money of such principal under the obligation, *when the title has been obtained by purchasing from the United States, to turn over the land purchased to the concealed and disqualified principal? That the statute does expressly prohibit such a transaction we think is foreclosed by a previous decision of this court.*

* * * * *

The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person, and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is both in form and substance a

prohibition against the doing of such act. To hold that this prohibition does not exclude the existence in a disqualified person of a power to employ an agent to make a second entry, to furnish him with the money to pay for the land, *under an obligation when he has bought from the United States to transfer the land to the disqualified person*, would require us to say that the power was given to do that which the statute, in express terms, declares shall not be done. In other words, it would compel us to decide that an act done for a disqualified person by an agent acting for him and for his exclusive benefit was not the act of the disqualified principal. But this would be to nullify the prohibition upon the inconceivable hypothesis that the act of a duly authorized agent was not the act of his principal. To escape this impossible result it is insisted in argument that where a person qualified to purchase buys in his own name without disclosing that he is a mere agent for a disqualified person, as he, the agent, thereby exhausts his individual right, the purchase must be treated as his and not that of the undisclosed principal. This, however, does not change the situation, but simply seeks to avoid it by the statement of a distinction without a difference, since it again but reads the prohibition out of the statute by causing it to be inoperative if the disqualified person elects to do by another, his agent, that which the statute forbids him to do. True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States

to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows since the right to sell that which one has lawfully acquired neither directly nor indirectly implies *the authority to unlawfully acquire in violation of an express prohibition* (pp. 387, 388).

* * * * *

The unsoundness of the argument that as when the prohibited entries were made the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States *were procured* in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling in *Hyde* v. *Shine*, where a like contention was decided to be without foundation.

The attempt to distinguish this case from *Hyde* v. *Shine*, upon the theory that there the parties obtaining the land were disquali-

fied whilst in this they were not, rests upon the misconstruction of the coal land statutes which we have already pointed out, a misconstruction which we have seen led the court, in its ultimate conclusion, erroneously to say that the entrymen who acted as the agents of the disqualified persons or corporation were not forbidden by the statute to act as they did, because they might have made an entry for themselves.

Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that if the words to defraud in any manner or for any purpose receive a broad significance charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. It will be time enough to consider such forebodings when a case arises indicating that the dread is real and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal-land laws, a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here

> charged. *The cogency of these considerations becomes more pointedly manifest when it is borne in mind that the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible* (pp. 394–395).

It will be observed that the court considered the very gist of this conspiracy to consist, not in the purpose to divest the title to the lands out of the Government, but in the design to have the title vested in the corporation which it was intended under the conspiracy should eventually take the title thereto; and that the divestiture of title out of the Government was only one step in the unlawful scheme, which had its consummation in the vestiture of the title in the corporation.

The same view had been previously taken by this court in *United States* v. *Trinidad Coal Co.* (137 U. S., 160, 166), which was an action in equity to set aside patents for lands which had been procured from the Government under a similar scheme, and in which the court said:

> It is contended that the case made by the bill is not within the prohibitions of the statute, although the demurrer admits that the Trinidad Coal and Coking Company acquired the lands in dispute pursuant to a scheme whereby the several tracts were to be entered for its benefit, in the name of certain persons, its officers, stockholders, and em-

ployees—the title, when thus obtained, to be conveyed to the company, which should, and did, bear all the expenses attending the entries and purchases from the Government. This contention can not be sustained unless the court lends its aid to make successful a mere device to evade the statute. The policy adopted for disposing of the vacant coal lands of the United States should not be frustrated in this way. It was for Congress to prescribe the conditions under which individuals and associations of individuals might acquire these lands, and its intention should not be defeated by a narrow construction of the statute. If the scheme described in the bill be upheld as consistent with the statute it is easy to see that the prohibition upon an association entering more than three hundred and twenty acres, or entering or holding additional coal lands, where one of its members has taken the benefit of its provisions, would be of no value whatever. * * *

There is, consequently in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because if the facts admitted by the demurrer had been set out in the papers filed in the land office the patent sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly.

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A like principle was declared in *Hyde* v. *Shine* (199 U. S., 62, 82) wherein the court said:

> * * * Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss. (*MacLaren* v. *Cochran*, 44 Minn., 255.) The law punishes the false practices by which the lands were *obtained*, and the question whether the Government stands in the position of a bona fide purchaser with respect to the school lands is not one which can be litigated in a criminal prosecution for a violation of law.
>
> Even if the United States were in a position to claim the rights of a bona fide purchaser to the state lands, the methods by which these lands were acquired from the States, and the lands in exchange therefor *procured* from the United States, would be none the less a fraud of which the latter might take advantage in a criminal prosecution. The indictment under section 5440 charges a conspiracy to defraud the United States out of the possession, use of, and title thereto of divers large tracts of public lands, and if the title to these lands *were obtained* by fraudulent practices and in pursuance of a fraudulent design, it is none the less within the statute, though the United States might succeed in defeating a recovery of the state lands by setting up the rights of a bona fide purchaser. Under the circumstances

> it can not be doubted that the United States might maintain a bill to cancel the patents to the exchanged lands procured by these fraudulent means, notwithstanding its title to the forest reserve lands might be good.

In fact the statutes under which the indictments in these several cases were found can admit of no other interpretation.

There can be no doubt under these and other authorities that the conspiracy set out in the indictment was an unlawful one, and the question here under consideration can be easily answered by ascertaining what made it unlawful. There is nothing in the indictment tending to show that either of the persons who made the entries had ever before exercised that right, or was in any way disqualified from making them. Then it was not unlawful for them to make the entries or the final proofs, or to take title to the land, or even to obtain money for that purpose from the defendants; nor was it unlawful for defendants to conspire to induce them to make such entries and proofs, and thus to acquire the title, and to furnish them money for that purpose. Suppose this indictment had stopped in its allegations at that point, alleging only a conspiracy to induce these several persons to make entries and final proofs, and thereby procure title to the lands from the Government, and to furnish them money for that purpose, could it be seriously contended that it would be sufficient? Then what is it that made the whole transaction from beginning to end fraudulent and unlawful, and the conspiracy to carry

the plans into effect a criminal offense? *But one thing, and that was the purpose to unite the title to these lands in one individual. With that element eliminated, the scheme was a lawful one; with that present, the scheme was a crime. Consequently, the very overt acts, the contemplation of which made the conspiracy an unlawful agreement, and an offense denounced by the statute, were the very ones which were committed within three years before the finding of the indictment.* Can it be possible that these overt acts upon which the illegality of the whole transaction rested, which would enable the Government to have the titles to the various tracts canceled for fraud and the conspirators subjected to imprisonment, were not committed in furtherance of the conspiracy, and in its consummation?

The court below, and the Circuit Court of Appeals in the *Lonabaugh* case (179 Fed., 476), which will be hereafter specially considered, have entirely mistaken the true nature of the fraud perpetrated upon the Government by schemes of this character. They have treated it as a mere matter of dollars and cents, and have therefore considered that when the Government parted with the title to its property the fraudulent transaction had been consummated. But the mere parting with the title is a very insignificant part of the fraud. In fact, from a pecuniary standpoint, the Government was not defrauded in the least, because the indictment is drawn upon the theory that every cent to which the Government was entitled for the lands was paid by the enterers. And of what mate-

rial interest can the pittance which is paid per acre for those lands be to the Government? As is clearly shown by the foregoing authorities, the gist of the fraud consisted in the defeat of the policy adopted by Congress with reference to the disposition of these lands. They were held in trust by the Government for the use and benefit of its citizens; and it was thought by Congress that the public welfare would be best conserved by dividing these lands into small tracts and thus distributing them among its citizens. But by these fraudulent schemes this design was, as to the large bodies of lands involved in them, entirely defeated. The fact is especially emphasized that, so far as the indictment shows, up to within three years before its return, the titles to from one-half to two-thirds of the tracts of lands entered remained in the individual entrymen, and that the policy declared by Congress had not as to them been violated. In fact, if the several entrymen had at that time repudiated the unlawful scheme and refused to convey the lands in accordance therewith, the only ground upon which the United States could have had the patents canceled was that they had been issued on a false affidavit, because up to that time there had been no violation of the Government's policy, and consequently no fraud had been perpetrated upon the Government. Certainly, then, the execution of the conveyances by which these tracts of land were first consolidated and the policy of Congress was first violated was in furtherance of the unlawful object of the conspiracy. But we insist that every act by which the legislative

intent was further violated by a consolidation of large bodies of land in the hands of one individual, is equally obnoxious to the laws, and must be considered as an overt act in furtherance of the conspiracy when such act was contemplated by the conspirators.

The fact that the conspiracy was formed for the purpose of depriving the Government, by fradulent means, of its power to carry out a policy or to exercise a governmental function, and not to defraud it of money or property, is no ground of defense. If this question were an open one when the case of *Haas* v. *Henkel* (216 U. S., 462,479) was submitted to this court, it was there conclusively settled in favor of the Government. Haas and Holmes, an official of the Department of Agriculture, and others were indicted under section 5440, Revised Statutes, the object of the conspiracy being to defraud the Government by false manipulation of the government reports as to cotton crops; and the conclusions that the court reached with reference thereto is thus stated:

> These counts do not expressly charge that the conspiracy included any direct pecuniary loss to the United States, but as it is averred that the acquiring of the information and its intelligent computation, with deductions, comparisons, and explanations, involved great expense, it is clear that practices of this kind would deprive these reports of most of their value to the public and degrade the department in general estimation, and that there would be a real financial loss. But it is not

> essential that such a conspiracy shall contemplate a financial loss or that one shall result. The statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government. Assuming, as we have—for it has not been challenged—that this statistical side of the Department of Agriculture is the exercise of a function within the purview of the Constitution, it must follow that any conspiracy which is calculated to obstruct or impair its efficiency and destroy the value of its operations and reports as fair, impartial, and reasonably accurate would be to defraud the United States by depriving it of its lawful right and duty of promulgating or diffusing the information so officially acquired in the way and at the time required by law or departmental regulation. That it is not essential to charge or prove an actual financial or property loss to make a case under the statute has been more than once ruled. (*Hyde* v. *Shine*, 199 U. S., 62, 81; *United States* v. *Keitel*, 211 U. S., 370, 394; *Curley* v. *United States*, 130 Fed. Rep., 1; *McGregor* v. *United States*, 134 Fed. Rep., 195.)

It may be insisted that the indictment in this case is fatally defective because it does not allege that the conspiracy was formed for the purpose of defrauding the United States in the exercise of a governmental function; but, as above stated, this question was not raised in the court below, and was not passed on by that court. Furthermore, no such allegation is necessary, because the indictment charges every

essential fact necessary to show that the conspiracy was an unlawful one, and the nature of the fraud that would result to the Government should it be carried out.

The case of *Lonabaugh* v. *United States* (179 Fed., 476, 479, 481), which was recently decided by the Circuit Court of Appeals, Eighth Circuit, involved an indictment which in many respects was similar to the indictment in this case; and that court took the view held by the court below in the present case; and the grounds upon which it is insisted that conveyances executed subsequently to the issuance of the patents and by which the conspiracy is consummated by uniting the titles in one person, are not overt acts committed in furtherance of the unlawful object of the conspiracy are clearly set forth in the opinion of the court in that case in the following language:

> * * * The subsequent acts (to the issuance of the patents) are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; *that is, to defraud the United States of the possession and title?* This depends upon whether or not that object had been effected before those acts were done. If it had, the answer must be in the negative, because of the obvious inconsistency in treating an object already effected as still requiring something to be done to effect it. As to the possession, it is enough to say that it passed from the United States when the entries were secured; and as to the

right of possession, it is enough to say that it passed from the United States in a qualified sense when the entries were secured and passed unqualifiedly with the title. When, then, did the title pass from the United States? * * *

But it is contended that the conspiracy was not limited to the defrauding of the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. Passing the question of whether or not the indictment charges the object of the conspiracy so broadly, and treating the evidence as sufficient in that regard, we come at once to test the contention in the light of the statute. Section 5440 does not interdict all conspiracies, but only those whose object is "either to commit any offense against the United States or to defraud the United States in any manner or for any purpose," and then only when one or more of the conspirators do some "act to effect the object of the conspiracy." It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means; it must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; *it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained "the object of the conspiracy," in the sense of the statute, is*

> *effected.* In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States of certain of its public lands, *and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them, considering the antecedent agreement or obligation in pursuance of which the entries were secured.*

The view here expressed is, it is submitted, wholly unwarranted by the statutes, and, as above shown, is in direct conflict with the holding of this court in *United States* v. *Keitel.* As appears in the last expression of the court above quoted, the decision rests upon the assumption that the object of the conspiracy, to wit, the defrauding of the United States, was effected when the lands were patented to entrymen who were not entitled to them, because of the antecedent agreement or obligation in pursuance of which the entries were secured; when, as a matter of fact, *this was only one step in the fraudulent scheme, and not the most important step, as it within itself was not unlawful, but became so solely because of the prior agreement that subsequent conveyances would be executed by which the title should be vested in one individual, and by the execution of such deeds in pursuance of the agreement.*

If the conspiracy set forth in the indictment were of such character, that acts which occurred beyond a certain point in carrying out the conspiracy were not

denounced by the statute, and were not in themselves unlawful or designed to bring about and aided in bringing about an unlawful condition, then the reasoning of the court in the *Lonabaugh* case would be sound. But such is not the case, and every act in the scheme from the first step in making the entry to vesting title in the lumber company was a material one in consummating the unlawful purposes of the conspiracy.

III.

The commission of an overt act in furtherance of a conspiracy made criminal by section 5440, Revised Statutes, within three years before the finding of an indictment for such conspiracy, prevents the the bar of the statute of limitation, though such conspiracy may have been formed and other overt acts committed more than three years prior to the return of the indictment.

First. *Views of United States courts with reference to effect of overt act upon the running of the statute of limitation against the offense of conspiracy under section 5440, Revised Statutes.*

Apparently this court has not yet had before it this exact question for determination, though it has been considered and decided by a number of the lower United States courts. The conclusions reached by them, and especially the reasons assigned in support of their conclusions, are very diverse; and for the convenience of the court the reasoning of each of the several courts who have considered the question is here given, the first quotations being taken from opinions in which it was held that the action was

barred at the expiration of three years from the first overt act.

In *United States* v. *Owen* (32 Fed., 534, 537, 538), District Judge Deady said:

> In support of the prosecution it is contended that the crime was not completed until the commission of the last acts done in pursuance of the conspiracy; and that as the filing of the false description by Owen, on December 22, 1884, and the making and using the alleged forged affidavits by Barnhart, in September and October of the same year, each took place within the three years immediately preceding the finding of the indictment, the prosecution is not barred. In this respect it is likened to or said to be a continuous crime. No authority is cited for the proposition and, on general principles, I think it can not be maintained.
>
> An instantaneous crime, such as arson or killing, is consummated when the act is completed. A continuous crime, such as carrying concealed weapons, endures after the period of consummation. In the former case the statute of limitations begins to run with the consummation, while in the latter it only begins with the cessation of the criminal conduct or act. But even then it is a bar to a prosecution for any act or part of the continuous crime which occurred three years prior to such time.
>
> As has been said, this crime consists, not in a continuous series of acts, constituting what may be called a habit, but of two distinct

> things only—a conspiracy and an act done in pursuance thereof at any time thereafter. But admitting this is a continuous crime, the demurrer must be sustained on this point. That being the case, the prosecution of the defendants for any act committed three years before the finding of the indictment is barred by lapse of time, and those alleged to have been committed within three years of such finding are not sufficient to constitute the crime defined by the statute. The very foundation of the crime—the conspiracy—is shut out, and without this circumstance the offense in question is not charged in the indictment. However, this is an instantaneous crime, composed of the conspiracy and the first act done to effect the object thereof, at whatever distance of time therefrom. When the conspiracy is formed the crime is begun, and when the act is committed it is consummated. An indictment will then lie against the criminal, and the limitation on the right of the Government to prosecute him begins to run, and in three years the bar is complete.

In *United States* v. *McCord* (72 Fed., 159, 164, 165) District Judge Bunn, in charging the jury, said:

> I have no doubt that the statute of limitations has stood in the way of this prosecution from the first, and that counsel for the Government have felt the difficulty. They admit that the indictments may properly have been found in March, 1891; that the conspiracy to defraud the Government was then formed by the defendants, and various overt acts

performed intended to effectuate its objects. If this be so it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies from what you have in other offenses against the Government, which could not have been the intention of the law. The purpose evidently was to make a uniform rule, applicable to all offenses of the same grade. Counsel no doubt anticipated this difficulty and sought to avoid it by alleging an overt act committed on October 23, 1891, so as to avoid the claim of the running of the statute. Now, to make good this contention, it is claimed that a conspiracy is a continuing offense. No doubt a conspiracy is a continuing offense in this sense, that whenever an individual comes into the conspiracy, however late, he is considered as adopting all the previous acts of his co-conspirators, and is liable in the same degree with them. But that it is a continuing offense in the sense that, as to the first and original parties to the conspiracy, this statute begins to run anew from the time of the commission of every overt act, is a contention that the court is unable to affirm. It may be true that, as to Murray, who it is alleged was brought in to homestead a quarter section on October 23, 1891, the statute would not begin to run until he became a party to the conspiracy. The court does not decide that question, because it is not before the court, Murray not being on trial; but as to the defendants whom the evidence for the prosecution is directed to show originated the conspiracy in March

> and April, 1891, and committed overt acts to effectuate its object, it seems pretty clear that the statute began to run from the time the first overt act was committed, some three years and eight months previous to the finding of the indictment. They would, of course, still be liable to prosecution for any distinct illegal act, like causing an entry to be made contrary to law, by which the Government was defrauded, or procuring false affidavits to be made. The statute would run upon such distinct acts from the time of their commission, independent of when the conspiracy was originated and formed.

This reasoning was adopted by Judge Lewis in *United States* v. *Biggs* (157 Fed., 273).

In *Ex parte Black* (147 Fed., 832, 837, 841) District Judge Quarles said:

> It is contended on the part of the Government that this was a so-called continuing crime. Conceding for the purposes of the arrgument that a conspiracy may, under certain circumstances, be recognized as a continuing crime, what fact or feature is there here to bring this case within such a classification? Here the conspiracy was confined to a single undertaking limited to particular descriptions of land, and completed within six months. The entrymen were handled like a drilled squad, and transported from place to place, taking the several necessary steps which culminated on the 17th day of March, 1903. No effort was made to enlarge the original conspiracy to embrace any other lands, or adapt it to any

> further or different transaction. In the Green-Gaynor case (*United States* v. *Green* (D. C.), 115 Fed., 349; *Greene* v. *Henkel*, 183 U. S., 251; 22 Sup. Ct., 218, 46 L. Ed., 177) the conspiracy was formed in 1891. From year to year the old conspiracy was adapted to new contracts, whereby the Government was defrauded; and in 1897 it was revived as to certain new government contracts. There might be some reason for treating that as a continuing offense which was revived afresh with each new contract. But there is no well-reasoned case to which my attention has been called which justifies the doctrine that in every case of conspiracy the statute begins to run from the last overt act instead of the first. In cases of that nature the doctrine of *Commonwealth* v. *Bartilson* (85 Pa., 482) and *Insurance Company* v. *State* (75 Miss., 24; 22 South, 99) is the more sane and reasonable. If the illicit scheme is continued and new overt acts to carry it out occur within the period of limitation, the pleader should charge a new conspiracy and the jury may be warranted from all the evidence in finding the existence of such new offense within that period.

This case on appeal was affirmed by the Circuit Court of Appeals, Seventh Circuit, on the ground that the conspiracy had been completed more than three years before the finding of the indictment, and the court did not pass upon the effect on the running of the statute of overt acts committed within the three years.

The courts who have held that an overt act committed within the statutory period prevents the bar of the statute have expressed their views as follows:

In *United States* v. *Bradford* (148 Fed., 413, 417, 418) Judge Parlange considered the question at length, saying:

> At common law the conspiracy alone constitutes the offense, without any overt act, and the conspirators can be prosecuted from the instant the conspiracy is formed. But under Revised Statutes, section 5440, no conspiracy can be prosecuted until an overt act is committed. I am fully aware of the statements found in the decisions to the effect that under Revised Statutes, section 5440, the gist of the offense is the conspiracy, and that the overt act is no part of the offense. Mr. Justice Woods so stated in *United States* v. *Britton* (108 U. S., 204; 2 Sup. Ct., 534; 27 L. Ed., 698). It may be interesting to notice in passing that it seems the same learned jurist had previously held the reverse in *United States* v. *Dennee* (3 Woods, 50; Fed. Case No. 14948). But those statements have never been made with regard to or as affecting the question of the statute of limitations here presented. I agree fully that the overt act is not an element of the offense in the sense in which in criminal law a specific criminal intent, for instance, is an ingredient of an offense. Such ingredients are, as I believe, always culpable per se; whereas the overt act may be per se, and, considered independently of the conspiracy, a perfectly innocent act. But the indisputable

fact remains that an offense under Rev. Stat. 5440 can not be prosecuted until an overt act is committed. A criminal offense against the sovereign, which he can not prosecute and punish, is, it seems to me, a matter which the legal mind can not grasp. It is plain, then, that the statute of limitations is not set in motion by the forming of the conspiracy, but that the moment the conspiracy is formed and an overt act is committed by one of the conspirators to effect the purpose of the conspiracy, that moment the offense can be prosecuted and the statute of limitations begins to run as regards that conspiracy and that particular overt act. But I am absolutely unable to agree that if, after committing the first overt act, the conspirators do nothing more for three years, and they are not prosecuted within that time, they can thereafter continue the conspiracy, or renew it either publicly or secretly and as often as they please, and that they can commit as many acts as they choose to effect the object of the conspiracy, and yet have absolute immunity from prosecution for the conspiracy. It is well settled, as I have already said, that the overt act need not itself be an offense. It might therefore be absolutely noncriminal per se, and, being such, it could not attract the attention or arouse the suspicion of the Government. That immunity from prosecution for the conspiracy would result from the lapse of three years after the commission of the first overt act, although the conspiracy was thereafter continued or repeatedly renewed, and many other overt acts committed

under it, is, to my mind, an utterly irrational conclusion, which the law could never have contemplated.

It was said during the trial that my view would lead to the conclusion that for the same offense persons might be subjected to many prosecutions. But this is entirely incorrect. While the conspiracy per se might be the same, yet if the conspirators chose to renew it, or to continue it in existence, and to commit new overt acts to carry it out, the conditions under which the right of the Government to prosecute would arise would be different every time a new overt act was committed. If, under such circumstances, the conspirators are subjected, so far as the statute of limitations is concerned, to a prosecution every time they commit an overt act, that result is not brought about by any act of the prosecution in splitting up a continuous offense, as was attempted to be done in *In re Snow* (120 U. S., 281; 7 Sup. Ct., 556, 30 L. Ed., 658), a prosecution for unlawful cohabitation with several wives, or by tolling the statute of limitations; but the result flows directly and exclusively from the acts of the conspirators themselves. It might be said of their complaint, as was said by the Supreme Court of Vermont quoted by the Supreme Court of the United States in *O'Neil* v. *Vermont* (144 U. S., 331; 12 Sup. Ct., 696; 36 L. Ed., 450) [a prosecution for unlawful selling of liquor, in which the defendant was convicted of 307 offenses and sentenced, in the aggregate, to a fine of $6,638.72 and to imprisonment for more than fifty-five years]

that the result is brought about not by the law, nor by any interpretation of it, nor by any act of the prosecution, but solely by the fact that the complaining defendants committed too great a number of offenses. Obviously, if the defendants had been charged with numerous different conspiracies, completed, as regards the ability of the Government to prosecute, by the commission of many different overt acts, they would not be heard to complain of a situation brought about entirely by their own criminal acts, and which subjected them to many prosecutions. What difference, so far as regards the statute of limitations, is there in principle between the condition just stated and the proposition that there may be as many prosecutions as there are overt acts, when the same conspiracy is renewed as each different overt act is committed? The conspiracy C, plus overt act A, create a criminal condition for which the Government can prosecute under the terms of Rev. Stat., section 5440, during three years from the date of overt act A. The same conspiracy C, or any other conspiracy, plus overt act B, create another and a different criminal condition, for which the Government can prosecute during three years from the date of overt act B. And so on. No court has ever held that under Rev. Stat., section 5440, the statute of limitations begins to run from the original formation of the conspiracy and before the commission of any overt act. As I have said before, it is inconceivable to me that the statute of limitations should

> begin to run before the Government could prosecute. The difference of opinion is: (1) Whether the statute of limitations begins to run from the commission of the first overt act, regardless of any subsequent overt acts? Or (2) whether a prosecution begun within three years of any overt act, committed to effect the purpose of a conspiracy then in existence and in full operation, is maintainable.

This was probably the first dissent from the view that the action was barred within three years from the commission of the first overt act; and the reasoning was on appeal adopted by the Circuit Court of Appeals, Fifth Circuit (152 Fed., 616).

In *United States* v. *Brace* (149 Fed., 874, 876, 877) Judge De Haven expressed his views in the following language:

> In my opinion the allegation in the indictment that the defendants during all the times between May 25, 1902, and the commission of the last overt act therein set forth continued to conspire together to defraud the United States of the title to its public lands, in the manner and by the means agreed on between them on May 25, 1902, is not equivalent to a charge that the defendants subsequently to that date entered into a new conspiracy for the purpose of accomplishing their unlawful design to defraud the United States of certain of its public lands. It is simply, in effect, an allegation that the conspiracy formed on May 25, 1902, was never abandoned, but was in continuous operation thereafter until the date of the last overt act set out. The indict-

ment, therefore, is to be construed as charging but one conspiracy; that such conspiracy was formed by the defendants on May 25, 1902, and numerous overt acts were thereafter committed by them for the purpose of effecting its object, the first of these acts on June 10, 1902, and the last on September 15, 1902; that from the date of its formation until the commission of the last overt act in pursuance thereof, the conspiracy so formed on May 25, 1902, was, in the language of the indictment, "continuously in process of execution." Assuming that the conspiracy was formed and the overt acts committed upon the particular dates named in the indictment, the precise question which is raised by the demurrers to the special pleas relates to the time when the right of the Government to prosecute the defendants for the offense charged in the indictment began to run.

Section 1044 of the Revised Statutes (U. S. Comp. St., 1901, p. 725) provides that no person shall be prosecuted for an offense of the character described in this indictment unless the indictment is found "within three years next after such offense shall have been committed;" while the succeeding section declares that this limitation shall not extend to the case of any person fleeing from justice. The contention of the defendants is that the right of the Government to prosecute them accrued upon June 10, 1902, the date of the first overt act, and as this was more than three years prior to the finding of the indictment the right to prosecute for such offense is barred; and

support for this contention is undoubtedly found in the cases of *United States* v. *Owen* (D. C.; 32 Fed., 534), *United States* v. *McCord* (72 Fed., 159), *Ex parte Black* (D. C.; 147 Fed., 832), *Commonwealth* v. *Bartilson* (85 Pa., 482), and *Insurance Co.* v. *State* (75 Miss., 24; 22 South., 99). The argument which is advanced to sustain this conclusion is very strongly stated by Deady, J., in *United States* v. *Owen* (D. C.; 32 Fed., 534), and proceeds upon the theory that a conspiracy is not to be deemed a continuous crime while in process of execution, but is a completed offense the moment the first overt act is committed in pursuance thereof, as much so and in the same sense as the crime of murder or arson is complete and at an end when the deed is done. Of course, if this be so, the statute of limitations would commence to run at the date of the commission of such overt act; but it seems to me that the more reasonable view is that which was followed by the Supreme Court of Illinois in the case of *Ochs* v. *People* (Ill.; 16 NE., 662) and *United States* v. *Greene* (D. C.; 146 Fed., 803–889), and that is to regard the conspiracy as a continuing offense so long as the parties thereto continue to perform acts to effect its object, and thus considered the prosecution thereof is not barred if any overt act has been committed within the statutory period. The crime defined in section 5440 of the Revised Statutes may be said to be a continuing offense so long as it is in process of execution, as manifested by

overt acts in pursuance thereof. At common law the crime of conspiracy was complete when two or more persons combined for the purpose of committing an unlawful act, and it was not necessary to allege or to prove an overt act; but under section 5440 of the Revised Statutes there must not only be the unlawful combination, but one of the parties must do some act for the purpose of effecting its object. (*Hyde* v. *Shine*, 199 U. S., 62; 25 Sup. Ct., 760; 50 L. Ed., 90; *U. S.* v. *Nunnemacher*, 7 Biss., 11, Fed. Cas. No. 15902; *U. S.* v. *Goldberg*, 7 Biss., 173, Fed. Cas. No. 15223.) The crime consists in putting the corrupt agreement into active operation, and so long as it is in operation the offense is a continuing one. This being so, my conclusion is that whenever a person commits any act in pursuance of an existing conspiracy, no matter when such conspiracy was formed or how many precedent acts have been committed for the purpose of effecting its object, the offense defined in section 5440 of the Revised Statutes (U. S. Comp. St., 1901, p. 3676) is then committed and is subject to prosecution. In saying this I do not mean to be understood as holding that when a number of acts have been committed in furtherance of one conspiracy there may be as many prosecutions therefor as there were acts. There can be but one prosecution based upon a single conspiracy, and this is not barred as to any overt act within the statutory period.

In *United States* v. *Raley* (173 Fed., 159, 167) Judge Wolverton, after quoting from the case of

Jones v. *United States*, hereinafter set forth, and citing several cases, concluded as follows:

> I take it that the true doctrine is that, so long as it may be shown that the conspirators are acting together for the common purpose comprehended by the scheme, and have, while so acting together, committed some overt act, all within the three years prior to the finding of the indictment, the statute has not run. A conspirator may withdraw from the common purpose. If he does so, and three years have run without his participation, although others of the original conspirators may have continued in the execution of the common design, he could not be prosecuted. But as to those who are still participating in the effectuation of the unlawful purpose when the overt act is committed, being committed within the three years, they are still confederating, conspiring, and agreeing together, and are chargeable with having committed the offense of conspiracy within the statute fixing the limitation for prosecuting the same.

In *United States* v. *Breese* (173 Fed., 402, 411) Judge Newman, in charging the jury, said:

> In the opinion of the court the law applicable here, and to the facts of this case, is this: The indictment charges a conspiracy was entered into on July 1, 1897. It would be immaterial whether the conspiracy charged, if you believe there was a conspiracy, originated more than three years before the finding of the bill of indictment, indeed it would be immaterial if it was entered into soon after

this bank was established in 1888, 1889, 1890, or 1891, provided you believe that overt acts were committed all along down during the succeeding years and to a period within three years before the finding of the bill of indictment; if also there was continued unlawful agreement and understanding between the parties, amounting to a conspiracy, all along down to and within the period of three years before the bill of indictment was found true on October 5, 1897. The law is that there may be a renewal or a continuance of a conspiracy if there be renewed and continued combination, agreement, and understanding between the alleged conspirators, and successive acts are done in pursuance of and to effect and consummate the conspiracy. No matter when the conspiracy originated, if you believe that there was a continued understanding, expressed or tacit, amounting to a conspiracy, between the alleged conspirators, or any two of them, and acts were done in furtherance of and to effect the object of the conspiracy along down to, and embracing a period within, three years before the finding of this bill of indictment, which, as stated, was October 5, 1897, then you would be authorized to consider the same and act upon the same, notwithstanding the fact that these defendants, in your opinion, had an agreement and understanding and did acts to consummate and carry the same into effect more than three years before the finding of the bill of indictment. The conspiracy, however, must have been in existence and have been in operation

> within three years of the finding of the bill of indictment, and, further, there must have been some act done by at least one of the conspirators to effect the object of the conspiracy within the three years.

In *Ware* v. *United States* (154 Fed., 577, 579, 580) Judge Sanborn expressed the opinion of the Circuit Court of Appeals, Eighth Circuit, in the following language:

> After a careful reading and consideration of these and other authorities, our conclusions are that the true answer to this question is that the existence of the conspiracy and the conscious participation of the defendant therein within the three years are indispensable to the maintenance of such a prosecution, but that if these facts are established by competent evidence such a prosecution may be sustained. Proof of the formation by the defendant and others, more than three years before the indictment, of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years is insufficient to sustain the charge of a conspiracy within the three years. But in connection with evidence aliunde of the existence of the same conspiracy, and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the three years pursuant to a conspiracy between him and

the defendant, formed and followed by an overt act more than three years prior to the filing of the indictment without the defendant's consent or agreement within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years.

The offense under section 5440 is the conspiracy, not the conspiracy and the overt act. "The provision of the statute," says the Supreme Court, "that there must be an act done to effect the object of the conspiracy, merely affords a locus penitentiæ, so that before the act done either one or all of the parties may abandon their design, and thus avoid the penalty prescribed by the statute." (*U. S.* v. *Britton*, 108 U. S., 199, 205; 2 Sup. Ct., 525; 27 L. Ed., 703.) So that there is a locus penitentiæ after the performance of each overt act and a presumption of the innocence of the defendant, and if, after the performance of the first overt act, a defendant abandons the design of the conspiracy and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy without the conscious participation of the defendant ought not to charge, and can not charge him with the offense, because they fail to evidence his intent to violate the law within three years.

On the other hand, the offense denounced by section 5440 is not the mere formation,

but the existence, of the conspiracy and its execution. And if, by the agreement, or by the joint assent of the defendant, and one or more other persons, within the three years, the unlawful scheme of the conspiracy is to be prosecuted, and an overt act is subsequently done to carry it into execution, the mere fact that the same parties had conspired and had wrought to accomplish the same or a like purpose, more than three years before the filing of the indictment, ought not to constitute, and does not constitute, a defense to the charge of the conspiracy within the three years.

The same rules of law and of evidence govern the trial and the decision of the issue whether or not the defendant jointly with others consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme which control the trial of the issue whether or not the conspiracy was originally formed, where that is the crucial question. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. Until such evidence is produced, the acts and admissions of one of the alleged conspirators are not admissible against any of the others unless the court in its discretion permits their introduction out of their order. But where evidence has been produced from which the joint assent of the defendant and one or more other persons

> within the three years to the existence and the execution of the conspiracy may reasonably be inferred by the jury, then any subsequent act or declaration of one of the parties in reference to the common object which forms a part of the res gestæ may be given in evidence against one of the others who has consented to the enterprise. And the joint assent of the minds of a defendant and others within the three years to the existence and execution of the conspiracy may be found by the jury like any other ultimate fact as an inference from other facts proved. (*Drake* v. *Stewart*, 22 C. C. A., 104, 107; 76 Fed., 140, 143.)

In *Jones* v. *United States* (162 Fed., 417, 426, 428) Judge Ross expressed the views of the Circuit Court of Appeals, Ninth Circuit, as follows:

> By some courts it has been held that inasmuch as the offense under section 5440 is the conspiracy, made effective by the commission of an overt act thereunder, the statute of limitations, which is three years, begins to run as soon as the first of such overt acts is committed, and that three years thereafter the entire offense denounced by the statute becomes barred. (*U. S.* v. *Owen* (D. C.), 32 Fed., 534; *U. S.* v. *McCord* (D. C.), 72 Fed., 159; *Ex parte Black*. (D. C.), 147 Fed., 832.) If the conspiracy in question contemplated but the one overt act, that would undoubtedly be so. But we think it equally plain that where, as in the present case, the alleged conspiracy contemplated various overt acts, and the consequent continuance of the

conspiracy beyond the commission of the first one, then each overt act gives a new, separate, and distinct effect to the conspiracy, and constitutes another crime. Take, for illustration, a case that arose in California many years ago, reported in 64 Cal., 293, 30 Pac., 847, under the title of *People* v. *Collins*, where a murder was committed in pursuance of a conspiracy entered into by three men named, respectively, Collins, Thorne, and Crumm, for the robbing, among other things, of stages and their passengers whenever and wherever opportunity offered. In that case it appeared that, before Collins and Thorne committed the crime for which Collins was adjudged to suffer death, Crumm withdrew from the conspiracy; that is to say, he took advantage of the "locus penitentiæ," and thus avoided the penalty to which he also would otherwise have been subject. But Collins and Thorne proceeded with the unlawful and wicked undertaking, camped in the vicinity of Nevada City, Cal., held up a stage, compelled the passengers to alight therefrom, and upon the refusal of one of them to surrender his valise, containing two bars of gold bullion, one of the robbers fired upon him with a shotgun, killing him almost instantly. Months afterwards Collins was apprehended, and was finally tried, convicted, and sentenced to death. Suppose that California had a statute requiring, as does section 5440 of the Revised Statutes, an overt act to make the conspiracy effective, and that after the holding up of that one stage and the commission of that one murder the conspirators,

> in pursuance of the same conspiracy, had held up other stages and committed other murders; would there be any sound sense in holding that no other or further crime had been committed, on the ground that the offense had been completed and ended by the first murder, the first overt act? We do not think so, for the reason that the conspiracy was a continuing one in its nature, and, so long as the conspirators continued in pursuance of it, each overt act committed by any one of them gave to the conspiracy effect and constituted an offense at the time of the commission of the act. So, in the case at bar, the conspiracy alleged contemplated the commission of various overt acts. It was a continuing conspiracy, and so long as the conspirators continued in pursuance of it, and did not avail themselves of the locus penitentiæ that section 5440 of the Revised Statutes afforded them, every overt act committed by any party to the conspiracy gave new effect to the conspiracy and constituted another crime.

In *Lorenz* v. *United States* (24 Appeals, D. C., 337, 387, 388) the views of the Court of Appeals, District of Columbia, was thus expressed by Chief Justice Shepard:

> The contention on behalf of the appellants is that, if the conspiracy was in fact formed, and a single act in aid of its object committed, more than three years before the finding of the indictment, then the offense was barred by the statute of limitations; and that no other like act or acts, committed within three years,

> would amount to a renewal or continuance of the conspiracy so as to remove the bar.
>
> We can not agree with this contention. Undoubtedly, as argued, the conspiracy is the gist of the offense defined in section 5440, Revised Statutes (U. S. Comp. Stat., 1901, p. 3673), though it is not indictable until some act shall have been done by one or more of the conspirators to effect the object of the corrupt agreement. The offense is then complete as to that act, and the statute at once begins to run; but it does not follow that all similar acts thereafter may be committed with impunity. Through the repetition of such acts—overt acts, as they are commonly called—the conspiracy is made a continuing offense. By each subsequent act it is repeated and entered into anew.

In the present case the court held without discussing the question that an overt act committed *in furtherance of the conspiracy* within three years before the finding of the indictment would prevent the bar of the statute.

In *United States* v. *Greene* (115 Fed., 343, 355) the question of the bar of the statute was not involved, but Judge Speer approved the principle laid down by Judge Marcy in *People* v. *Mather* (4 Wend., 229) that—

> the law considers that wherever they (conspirators) act there they renew, or perhaps, to speak more properly, they continue, their agreement; and this agreement is renewed or continued as to all whenever one of them does an act in furtherance of their common design.

Second. *Nature of the offense of conspiracy under section 5440, Revised Statutes.*

In *United States* v. *Britton* (108 U. S., 199, 204, 205) this court, speaking through Mr. Justice Wood, said:

> This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone. The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus penitentiæ*, so that before the act done either one or all of the parties may abandon their design and thus avoid the penalty prescribed by the statute.

In *Dealy* v. *United States* (152 U. S., 539, 543, 547) the indictment was drawn under section 5440, Revised Statutes, and contained seventeen counts, of which six were dismissed and a verdict of guilty was brought in on all the remaining counts except one. The difference in the counts consisted in the fact that a different overt act was alleged in each, and it was insisted that the acquittal as to one count was an acquittal as to all; and as to the effect of the overt act under this statute the court said:

> In the case at bar the section of the statute under which this indictment was found requires not merely a conspiracy, but some act to carry into effect its object. This act is only one of the means by which the conspiracy is sought to be carried into effect, just as in the illustration given, the blow of the pickax and the shot from the pistol are means for the

> accomplishment of the homicide, and a verdict of not guilty as to any one of the counts in this indictment is not necessarily a finding against any conspiracy, but only that the conspiracy and the overt act therein stated did not both exist, while a verdict of guilty upon any other count finds both the conspiracy and the overt act named therein. There is no conflict between the findings and no force to this objection.

Subsequently, in considering the insistence that the indictment was fatally defective because it was not alleged that the overt acts were committed within the jurisdiction of the court, the above language was quoted with approval from *United States* v. *Britton*, and the court added:

> Hence, if the conspiracy was entered into within the limits of the United States and the jurisdiction of the court, the crime was then complete, and the subsequent overt act in pursuance thereof may have been done anywhere.

This definition of a conspiracy under section 5440, Revised Statutes, given in *United States* v. *Britton*, has been quoted by many courts, and though it was a dictum in that case it appears to have been accepted as the true construction of the statute.

Furthermore, such a construction is a reasonable one, although the view expressed by some judges, and in fact by Justice Wood himself while circuit judge (*United States* v. *Dennee*, 3 Woods, 50), that the overt act is an ingredient of the offense, is not

without reason. But the crime of conspiracy was an offense which had long been known to the common law; and it is reasonable that the intention of Congress was to make the common-law offense applicable to the conspiracies therein designated, with the condition that an overt act should be committed before a prosecution could be had. Such a construction is in accord with the general rule relating to offenses created by act of Congress which were known to the common law.

Third. *The effect of an overt act upon a conspiracy at common law.*

The effect of an overt act upon a conspiracy at common law appears from the following authorities.

In Wharton on Criminal Law, Seventh Edition, page 681, it is said:

> If a conspiracy be once established, although it was concocted out of the jurisdiction of the court, an overt act committed by one of the conspirators within the jurisdiction of the court, in the pursuit of the common object of said conspiracy, is the act of each conspirator. In such cases we are to view the overt act as a renewal of the original conspiracy by all the conspirators, wherever committed.

In *People* v. *Mather* (4 Wend., 259) the court said:

> If conspirators enter into the illegal agreement in one county, the crime is perpetrated there and they may be immediately prosecuted; but the proceedings against them must be in that county. If they go into another

> county to execute their plans of mischief and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act there they renew, or, perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design.

In 6 Amer. & Eng. Cyc. of Law, p. 844, it is said:

> But a court having criminal jurisdiction of the place where any overt act is committed would also have jurisdiction of the conspiracy itself, the overt act in such case being, in legal contemplation, a continuance or renewal of the illegal agreement.

Also see authorities cited in note 3.

And there seems to be no dissent from the rule laid down in these authorities, that a conspiracy may be prosecuted in any jurisdiction wherein an overt act is committed in furtherance of the object of the conspiracy.

Furthermore, there seems to be no dissent from the proposition that at common law a prosecution for conspiracy is not barred if an overt act in furtherance of the conspiracy is committed within the statutory period before the finding of the indictment.

This question is probably more fully discussed in *Commonwealth* v. *Bartilson* (85 Pa. State, 482, 489, 490) than elsewhere.

This is a leading case in this country upon the question, and the principal part of the opinion of the court bearing upon this question is as follows:

> Acts and declarations of the parties prior to the statutory period may be given in evidence, provided they tend to show a conspiracy existing at the time charged in the indictment. It is true they would not be admissible for the purpose of proving a distinct crime barred by the statute. But where in conspiracy an overt act is done within two years and said act is but one of a series of acts committed by the parties, evidently in pursuance of a common design and to carry out a common purpose, such acts would be evidence, provided they tend to show that the last act was a part of the series and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the later period. And this though some of the prior acts may have occurred at a time when, as an independent conspiracy, it would have been barred by the statute. For, as before said, the overt acts are the evidence from which a conspiracy may be inferred. Hence it is that while as a general rule in criminal cases the venue must be laid in the county in which the offense was committed, yet in conspiracy it may be laid in any county in which an overt act has been done by any one of the conspirators. This rule is well settled. (Whart. Cr. Law, sec. 2350; Arch. C. P., 6; *Rex* v. *Scott*, 4 East, 164; *The People* v. *Mather*, 4 Wendell, 230.) This rests upon the

principle that the overt act is evidence of a conspiracy existing at the time and place where the overt act was committed. Of course, the overt act must be such as to tend to show that it was the result of conspiracy. As is said in Arch. C. P. & P., 1056, "Every overt act, to be evidence, must have at least a tendency to prove either the general nature of the conspiracy, or that one or more of the defendants were operating toward effecting that which is charged in the indictment as being the object of the conspiracy." But if the overt act charged in the indictment, or proved to have been done within two years, is sufficient to satisfy the jury of the existence of a conspiracy at that time, it is wholly immaterial when the parties thereto first formed the unlawful combination in their minds, or gave effect to it by concert of action. If it has been renewed from time to time, and overt acts committed through a series of years, and one of said acts has taken place within two years, each renewal constitutes a fresh conspiracy, for which an indictment will lie. It has been held that where a conspiracy had been formed outside of the jurisdiction of the court, an overt act committed within the jurisdiction is evidence of a conspiracy there. (*Rex* v. *Scott, supra.*) And all who accede to a conspiracy after it is formed become conspirators. (*People* v. *Mather, supra.*) For the reasons given we think the court below erred in quashing the second count.

The opinion of the court in this case is not altogether consistent, as the reasoning would imply that the conspiracy is a continuing offense, of the existence of which overt acts are evidence, while the conclusion was that overt acts are evidence of *renewals* of the conspiracy, and each renewal is an independent offense. This inconsistency manifestly arose out of an attempt upon the part of the judge delivering the opinion to explain an assertion which he had made in a previous opinion that there was no such thing as a continuing and completed offense. With reference thereto the court said:

> It was not intended to assert the absurd proposition that a man might not repeat an offense from day to day, as in the case of maintaining a nuisance, and other familiar instances which might be referred to. This may be done daily for any indefinite period. But a man could not be convicted of maintaining a nuisance charged to have been committed ten years prior to the finding of the bill of indictment by proving that he had continued the nuisance day by day to a time within the statutory period. In the sense, therefore, of tolling the statute it can not be said that a completed offense can be continued. It may be repeated from day to day, but the statute runs from the close of each day, and the indictment must charge the offense to have been committed within the statutory period.

The conclusion here reached by the court is a manifest absurdity, as it would be just as reasonable to

hold that one might be indicted at the end of every minute for maintaining a nuisance; and in order to be consistent therewith the court laid down the rule that the overt act was a mere evidence of a new conspiracy; and that the indictment must allege that the conspiracy, of which the overt act was evidence, was made within such time as would bar the prosecution. The court, in fact, sustained the quashing of one count of the indictment because it alleged that the conspiracy originally had been made more than the statutory period before the finding of the indictment, though it alleged overt acts within the period; but a general count which alleged a conspiracy within the period without alleging any overt acts, was held good, though in the commonwealth attorney's specifications as to what his proof would be he showed that the conspiracy had been originally made more than the length of time specified by the statute, and that the overt acts had been committed within the time. The court's view was that each conspiracy, which is evidenced by an overt act, constitutes a new crime, and that a prosecution may be had for each renewal. The opinion of the court in this case was quoted at length and adopted by the Supreme Court of Mississippi in *American Fire Insurance Company* v. *State* (22 Southern, 99, 103), to which the court added:

> But where in conspiracy an overt act is done within two years, and said act is but one of a series of acts committed by the parties evidently in pursuance of a common design, and to carry out a common purpose, such acts

> would be evidence, provided they tend to show that the last act was part of the series, and the result of an unlawful combination; and such evidence may satisfy a jury of the existence of a conspiracy at the latter period. And this though some of the prior acts may have occurred at a time when, as an independent conspiracy, it would have been barred by the statute; for, as before said, the overt acts are the evidence from which a conspiracy may be inferred.

The Supreme Court of Illinois in *Ochs* v. *People* (124 Ill., 399, 429) said upon this subject:

> The first instruction as to all defendants was faulty and misleading in telling the jury that the crime of conspiracy was complete, and the offense was then committed, when the agreement or confederacy was entered into, and that the period of limitation would commence to run from the time of committing the offense. The instruction was calculated to lead the jury erroneously to think that the period of limitation would commence to run from the time a defendant first became a member of the conspiracy instead of from the time of the commission of the last overt act in furtherance of the object of the conspiracy.

From the foregoing authorities and those hereinafter cited it appears that four views have been taken by the courts as to the nature of the offense of conspiracy and the effect thereon of an overt act.

First. That the offense consists in the formation of the unlawful agreement, or, in other words, the

hatching of the plot, and that an overt act renews the conspiracy whenever and wherever such overt act is committed, and the parties may be prosecuted for the new conspiracy at any time within the statutory period after the renewal.

Second. That the offense consists in the *existence* of the plot and not merely of its formation, and that consequently the offense is a continuing one, and an overt act committed by one or more of the conspirators is evidence of its existence at the time and place where such act is committed.

Third. The same as the second except that the overt act is not within itself sufficient evidence of the continued existence of the conspiracy except as to those conspirators who engage in the overt act; but as to the other conspirators, evidence *aliunde* of their conscious participation in the conspiracy within the statutory period is necessary. This is the theory expressed by the Circuit Court of Appeals, Eighth Circuit, in *Ware* v. *United States*, *supra*, but we have failed to find elsewhere any concurrence in this view. The authority nearest in accord is *Commonwealth* v. *Bartilson*, *supra*, but it is there held that the overt act may of itself be sufficient evidence to satisfy the jury that the conspiracy then existed.

Fourth. That the offense of conspiracy under section 5440, Revised Statutes, is completed when the agreement is entered into and the first overt act is committed, and is not renewable by the commission of a subsequent overt act, and that the statute of lim-

itations bars the prosecution at the expiration of the statutory period from the first overt act.

As above shown, this theory is against the great weight of authority, and if maintainable at all it must be because there is something in the language of section 5440, Revised Statutes, which differentiates the offense created thereby very materially from the offense of conspiracy at common law. But in *United States* v. *Britton, supra,* this court has held that the two offenses are identical.

Although the second theory is probably the more convenient one to prevent the running of the statute, yet I think the weight of authority and the better reasoning is with the first theory, except I do not think more than one prosecution can be maintained for the conspiracy, though it may be renewed many times by the commission of overt acts.

As to what constitutes the offense of conspiracy, in 2 Bishop on Criminal Law, section 171, it is said:

> Truly viewed, conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

In Wright's Criminal Conspiracies, edited by Carson, on pages 124 and 125, it is said:

> The fact of confederating is the gist of the offense, or, as C. J. Savage has said: *The conspiracy is the offense.* The conspiracy itself is the crime. It is different from an indictment for stealing, or an action for trespass, where the offense consists of an act done. The devising of means is not a constituent part

> of the offense, but an act done in pursuance of the original design. It is not the actual perpetration, but the original hatching of the plot which constitutes the offense. The overt acts charged to have been done in pursuance of a conspiracy are mere matters of aggravation and are not necessary to the consummation of the crime. The unlawful agreement constitutes the gist of the offense, and therefore it is not necessary to charge the execution of the unlawful agreement, and when such execution is charged it is to be regarded as proof of the intent or as an aggravation of the criminality of the unlawful combination. The crime is consummate and complete by the fact of the unlawful combination, and therefore if the execution of the unlawful purpose be averred it is by way of aggravation, and proof of it is not necessary to conviction, and therefore the jury may find the conspiracy and negative the execution, and it will be a good conviction. The crime is effected the moment the confederation is complete, though nothing be done in pursuance of the conspiracy.

In *Callan* v. *Wilson* (127 U. S., 540, 562) this court quoted the following definition from *Commonwealth* v. *Hunt* (4 Metcalf 111, 121):

> * * * It is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal to the injury of the public, or portions or classes of the community, or even to the rights of an individual.

Wharton's definition of conspiracy as given in 2 Wharton's Criminal Law, section 1337, eighth edition, reads as follows:

> An indictable conspiracy is a confederation by two or more persons to commit an indictable offense; or by deceit or falsehood or other fraudulent means to defraud the public generally, or a particular individual, though in a way which might not expose a single person to indictment if the fraud was undertaken by him alone.

This definition does not make it clear whether the offense is completed when the combination is entered into or whether it continues to exist; but according to the other definitions it is the *formation* of the conspiracy that constitutes the offense, and its mere existence thereafter is no part thereof. There is no dispute among the authorities that the offense is complete, and the conspirators may be prosecuted, the moment the unlawful agreement has been entered into; and clearly it can not be perpetuated by the mere existence of the agreement in the minds of the conspirators. But, however this might be at common law, I think the language of section 5440, Revised Statutes, that "if two or more persons *conspire*" can leave no doubt but that the offense created by this statute consists in the *formation of the conspiracy*, and that it is not a continuing one.

Then, what is the effect upon the conspiracy thus formed by the commission of an overt act in furtherance thereof by one of the conspirators? This must be determined by the results contemplated by the

parties entering into the agreement and that must naturally flow therefrom. When two or more persons conspire together unlawfully, they enter into a partnership for the accomplishment of the object contemplated; and every one of them agrees that he shall be represented in the accomplishment of the purposes had in mind by each of the other conspirators, and each of them is, therefore, an agent to that extent of them all, and whatever is done by either is the act of them all. When, therefore, an overt act is committed by one of the conspirators, it is the same as if every conspirator was present and engaged in that act. And this concerted action, performed for the accomplishment of an end understood by all, must, therefore, have the same effect as if all the parties had then and there entered into a new agreement, having precisely the same terms as the conspiracy that existed in the beginning. This does not, however, carry with it liability to prosecution for both the original conspiracy and the renewal thereof, as they are, in fact, the same conspiracy, the effect of the renewal being precisely the same as when one is liable to another by note, and to prevent the bar of the statute of limitations the old note is extinguished by the execution of a new one. The indebtedness is renewed, but no additional liability is incurred, because the new note is for the same indebtedness as the old.

No other theory is compatible with the holding of the courts that when a conspiracy is formed in one jurisdiction, and an overt act is committed in another,

the conspirators may be prosecuted within the jurisdiction where the overt act is committed. As the offense is the conspiracy, the prosecution is for the conspiracy and not for the overt act, and therefore the *conspiracy* must exist in the jurisdiction where the prosecution is had, which could not be unless the overt act renewed the conspiracy, and thus brought it within that jurisdiction.

If this theory be correct, then the conclusion reached by the Circuit Court of Appeals, Eighth Circuit, in *Ware* v. *United States, supra,* is wrong. Under the rule there laid down, where more than three years have elapsed since the commission of the first overt act, it is incumbent upon the Government to prove that there has been conscious participation by the defendant on trial in the conspiracy within three years, and that it is not sufficient to prove alone the commission of an overt act by a co-conspirator within that time. If each conspirator is, under the original agreement, an agent of all of them, such an agency will be presumed to exist until it is shown by evidence that one of them has withdrawn from the agreement; and this is especially true if the agreement contemplates a series of acts, as certainly, when one agrees with others upon the performance of acts necessary to accomplish a definite object, it will be presumed, until the contrary is shown, that he has not withdrawn from such agreement; and that each act in furtherance of the common design is committed by his consent.

If this were not true, before a prosecution could be maintained within a jurisdiction other than the one in which the conspiracy was entered into, it would be necessary to prove, not only the commission of an overt act in such jurisdiction, but also by evidence *aliunde* that the conspiracy existed there, which has never been suggested by any authority.

The opinion of Judge Parlange in *U. S.* v. *Bradford, supra*, which was adopted by the Circuit Court of Appeals, Fifth Circuit, also presents a very forceful and plausible theory why an overt act committed within three years prevents the running of the statute against an offense under section 5440. That theory is that the offense consists in the conspiracy, and that the phrase "and one or more of such parties do any act to effect the object of the conspiracy" provides a condition for a prosecution, which condition is not met alone by the first overt act, but arises on the commission of every overt act thereafter. The statute, it will be noted, makes no distinction in its terms between the several overt acts that may be committed in furtherance of the conspiracy, and no reason is apparent why the condition for the prosecution is not just as much complied with by the execution of the tenth overt act as by the first.

Suppose a conspiracy contemplated that no overt act should be committed within three years, and none were committed within that time, and thereafter one of the conspirators did commit such act, it, of

course, would not be insisted that the prosecution would be barred. Can there be more reason for holding that the prosecution for the offense which had been committed for more than three years before was saved by the arising of this condition, than to hold that the right of prosecution is saved by the commission of any subsequent overt act of precisely the same nature and designed for the same purpose?

Therefore the judgment of the court below should be reversed and the cause remanded for trial.

J. A. FOWLER,
Assistant Attorney-General.

OCTOBER, 1910.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1909.

NO. 798.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

JAMES T. BARBER AND SUMNER G. MOON,

Defendants in Error.

Brief of Defendants in Error

Record.

Owing to the fact that this case was tried at Boise by Hon. Robert S. Bean, of Portland, who was not present when the court minutes disposing of the issues were made (76 R., 45 T.); that defendants' pleas in abatement were not filed until after argument on demurrer had been heard and taken under advisement (75 R., 44 T.); that the government neither replied nor demurred to such pleas until after the decision of December 21st, 1909, which demurrers were filed *nunc pro tunc* as of December 16th, 1909, pursuant to leave granted the government by order dated December 27th, 1909 (76 R., 45 T.); and that no formal judgment was entered on the issues thus made, the record in this case is somewhat confusing, but the material facts disclosed by it are as follows:

The proceeding is based upon an indictment against defendants in error and others, returned in the District

Court of the United States for the District of Idaho. The indictment charges a conspiracy between the defendants in error and others to defraud the United States out of the possession of and title to certain public lands, in violation of section 5440 R. S. This indictment consists of four separate counts, the only one involved here being the fourth, found at pages 21 to 40 R., 14 to 26 T.

On July 1st, 1909, defendants filed a demurrer to this indictment in general, and specifically demurred to the first three counts. (59 R., 39 T.)

As appears from the court minutes, the matter came on for hearing on defendants' demurrer to the indictment on December 15th, 1909, whereupon leave was granted to the defendants to file a separate demurrer to count number four (75 R., 44 T.), and thereupon defendants demurred specially to this count. (61 R., 36 T.)

On December 16th, 1909, argument was closed, and the matter taken under advisement by the court, with leave to the defendants, by agreement of counsel for the respective parties, to file a plea in abatement. (75 R., 44 T.)

Pursuant to permission thus granted, the defendants in error, on December 16th, 1909, separately filed pleas in abatement to count number four. (63-65 R., 37-38 T.)

On December 21st, 1909, the parties appeared in court by their respective counsel, whereupon the defendants withdrew their demurrer to the third count, and complainant confessed the demurrer to the second count, and in accordance with the direction of Hon. Robert S.

Bean, who theretofore had heard and taken under advisement said demurrer and said plea in abatement, a minute was made on the court records overruling and denying defendants' demurrer and plea in abatement to the first count and sustaining the plea in abatement to the fourth count. (76 R., 45 T.)

On the same day, December 12st, 1909, the parties, by their respective counsel, entered into a stipulation pursuant to which the court minutes were made, to the effect that a *nolle* and order of dismissal be entered as to counts numbers one, two and three, and that the demurrer and plea in abatement of the defendants to the fourth count be heard and determined together, and that the order or ruling made on either should be deemed to have been made on both. (71 R., 42 T.)

On the same day, for the purpose of completing the record and avoiding the necessity of making an issue of fact on the pleas, the parties made a further stipulation that certain facts should be considered with the same force and effect as though set out in full in the plea in abatement. (68 R., 40 T.)

On December 27th, 1909, six days after the decision, counsel for the government applied for and were granted permission to file separate demurrers to defendants' pleas in abatement, the same to be filed *nunc pro tunc* as of December 16th, 1909, when the cause was submitted. (76 R., 45 T.)

No formal judgment was entered, except as shown by the court minutes on December 21st, 1909, by which defendants' plea in abatement to the fourth count is sustained.

This writ of error is brought under the provisions of the Criminal Appeals Act of 1907 to review the decision of the court on the issues thus made: first, by the indictment and defendants' demurrer thereto; and second, by defendants' plea and complainant's demurrer thereto.

Argument.

This Court has no jurisdiction, and the writ of error should be dismissed.

This Court, in *United States v. Cook*, 84 U. S. 179, said:

> "Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue,"

and Judge Dehaven of the Ninth Circuit, in *United States v. Brace*, 143 Fed. 703, held that the question of statute of limitations could not be raised by demurrer, but by a plea in the nature of a *plea in abatement*, or by evidence under the general issue.

Conforming to the rules thus established, the defendants, at the close of a two days' argument on demurrer, and by consent of counsel for the government and the court, filed the pleas in question as *pleas in abatement*. The parties stipulated that the demurrer and *plea in abatement* should be heard together, and the ruling or order made on either should be deemed to have been made on both. (71 R. 42 T.) The court deemed it a *plea in abatement*, and so ruled on December 21st, 1909. (76 R., 45 T.) Nearly one week later, and on December 27th, 1909, counsel for the government applied for and was granted permission to demur to defendants' *plea in abatement*. (76 R., 45 T.)

Whether, technically speaking, the statute of limitations should be raised by plea in bar or plea in abatement is not material here. No objection was taken on that ground in the court below, but, on the contrary, pleas in abatement were filed and heard by consent and by stipulation. The judgment entered does not purport to be a bar to future proceedings, but is an abatement and dismissal of the pending cause only.

But whatever the rule as applied to other crimes, a plea in abatement is the proper plea when an indictment for conspiracy fails to allege an overt act within three years. As repeatedly held by this Court, the crime "does not consist of both conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone". But the doing of some act to effect the purpose is a prerequisite to the right of the government to prosecute. Unlike other offenses, the right to prosecute does not accrue when the offense (that is the unlawful agreement) is committed, but when an act is done to effectuate it. Hence it is incumbent to allege and prove (a) that the defendants conspired; (b) that some one of them did an act to effectuate its purpose; and (c) that the right of the government to prosecute did not accrue more than three years before filing the indictment. *U. S. v. McCord*, 72 Fed. 159.

The plea of defendants in the case at bar presented two propositions: first, conceding that the indictment alleged the *existence* of a conspiracy within three years, there was no allegation of any act within that time which could, by any possible interpretation

be said to have been done to effectuate its purpose; and therefore the right to prosecute had not accrued; and second, that as all acts therein alleged which could be said to effectuate the purpose of the conspiracy were performed more than three years before filing the indictment, the government should proceed no further on this indictment.

It must be remembered that the government is not bound to set forth all of the acts of the conspirators tending to effectuate its purpose. It may select such of those acts as it intends to rely upon. If the selected acts prove to be of such a character as not to give the right of prosecution,— in other words, if they are not such acts as tend to effectuate the purpose of the conspiracy,— the indictment is bad, but the right to prosecute is not barred. Another indictment can be procured alleging other acts of the character specified in the statute, and the fact that a former indictment wasd ismissed because it did not show that the right to prosecute had accrued would be no bar to the action.

For these reasons, it is respectfully submitted that in cases of conspiracy a plea in abatement is the proper method of raising the defense that the right to prosecute has not accrued, because no one of the conspirators has "done any act to effectuate the object of the conspiracy."

Again, the defendants interposed a general demurrer to the fourth count for the reasons and upon the ground that such count did not state facts sufficient to constitute an offense. It appears from the record that two days were occupied in the argument of this demurrer.

The parties have stipulated that any judgment entered on the plea in abatement *should be deemed entered on defendants' demurrer.* Defendants, therefore, have, by stipulation, the right to a formal judgment dismissing the action on demurrer for the reason that it does not state facts sufficient to constitute an offense. As to whether or not the court decided any question in passing on this demurrer which would give this Court jurisdiction does not appear. The record does not show that the trial court either passed upon the validity of, or construed, section 5440, and as jurisdiction must affirmatively appear from the record, this writ of error should be dismissed.

The demurrers to defendants' pleas were properly overruled, and on failure to raise an issue of fact by replication, the pleas were properly sustained.

Assuming defendants' plea to be one in bar and not in abatement, and the only question presented in the court below, or in this Court, is the sufficiency of such plea on demurrer. Does the plea, if true, state a defense? It alleges that the indictment was not filed and no information returned until more than three years after the commission of the offense, and that during such period neither defendant was a fugitive from justice. The indictment shows the offense is not capital, or within the exceptions mentioned in section 1044 R. S., which provides:

> "No person shall be prosecuted, tried or punished for any offense * * unless the indictment is found or the information is instituted within three

years next after such offense shall have been committed."

In the case of *United States v. Celestine*, 215 U. S. 288, the question came before this Court on the government's demurrer to the special plea in bar interposed by the defendant. The only question passed upon was the sufficiency of the plea, which was sustained by the court below and the ruling reversed by this Court.

It is contended that the government's demurrer to defendants' plea should have been sustained, because (a) a special plea in bar is not permissible in a criminal case, but the defense of the statute of limitations must be made under the general issue; and (b) the plea is bad in form in that it does not confess the allegations of the indictment.

That the defense of the statue of limitations can be set up by special plea is established by the ruling of this court in *United States v. Cook*, 84 U. S. 179, and as all special pleas in bar are in substance a confession and avoidance, such pleas necessarily confess all that has gone before and seek to avoid by allegations of new matter. It is not necessary, therefore, in terms, to confess the allegations of the indictment. Nor are the defendants responsible for the failure of the government to file a replication to their plea, or the failure of the court to take evidence when no issue of fact was made by the pleadings.

If the prosecuting officer disputes the facts set forth in a special plea in bar, he should reply thereto and raise and issue of fact. If he denies its sufficiency in law, he should demur. *12 Cyc*, 362.

The offense as charged in the fourth count of the indictment was barred by the statute of limitations when the indictment was found.

The precise question before this court is the correctness of the decision sustaining defendant's plea in bar (assuming it to be such) as against complainant's demurrer thereto. This plea, being one in confession and avoidance, confesses all allegations of fact properly pleaded in the indictment. Hence there is before this court all such allegations of the indictment and any new matter pleaded in avoidance by defendants. In this case the allegation that defendants were not fugitives from justice constitutes the new matter.

In considering the indictment "the charging part" and allegations of overt acts must be considered separately, and each must be sufficient for its purpose. *United States v. Biggs*, 157 Fed. 264.

> "In an indictment for conspiracy under section 5440 the conspiracy must be sufficiently charged, and cannot be aided by the averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy".

United States v. Britton, 108 U. S. 205.

Pettibone v. U. S., 148 U. S. 203.

Charging Part Of Indictment. The charging part of the indictment alleges, eliminating unnecessary repetition and surplusage, that said Barber and Moon,

> "on September 1st, 1901, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously and at all times, between said first day of September, 1901,

and the date of the presenting and filing of this indictment, did unlawfully conspire * * to defraud the United States out of the possession and use of and title to divers tracts of timber lands of the United States therein described, * * by unlawfully soliciting, inducing and procuring a large number of persons to apply for and enter such lands under the laws of the United States, * * upon an understanding and agreement between said defendants and said persons so to be solicited, which agreement was to be had, made and entered into prior to and at the time of the first applications to enter said lands of said persons so to be solicited: (a) that the title to the lands that they and each of them should then be applying to enter and which they might thereafter acquire should inure to the use and benefit of said defendants and conspirators; (b) that the said defendants would show and point out and select for said persons so to be solicited the lands which they and each of them would subsequently apply to enter, etc.; (c) that said defendants and conspirators would, if necessary, furnish the money to make final proof, etc."

In addition to the foregoing material allegations there is contained in the charging part some surplusage relative to what the defendants proposed to do with the land after the title was procured from the government, or in other words, what should be done with the land after the purpose of the conspiracy, namely, to defraud the government out of its title, should be completed.

This either charges one conspiracy of September 1st, 1901, and continuing to the date of the filing of the indictment, or it charges as many different conspiracies as are set out overt acts. If the latter contention prevail, the indictment is obviously duplicitious; but it was contended in the court below and here that it sets up only one conspiracy, beginning September 1st, 1901, and continuing throughout, and as the charging part does not allege a renewal of such original conspiracy, or any meeting of minds subsequent to the first one on September 1st, 1901, we will assume, for the purpos of this argument, that but one conspiracy is stated. If so, it becomes important to know when the right of the government to prosecute for this conspiracy accrued, and for this we must look to the overt acts alleged.

Overt Acts. The grand jurors find that in furtherance, continuance and renewal of *said* conspiracy and agreement, and to effect the object thereof, the said defendants (a) did induce sixty-eight entrymen to apply at the land office to purchase the lands described; (b) did unlawfully induce the entrymen to make final proof (Then follows a statement of the application and final proof of each of such entrymen, from which it appears that the date of the last final proof was September 20th, 1904, or nearly four years before the filing of the indictment on April 14th, 1908); (c) did induce certain of the entrymen to convey their lands to Palmer, Long and Rand; (d) that *thereafter*, to wit: on April 10th, 1905, defendants induced Long to make a deed to the Barber Lumber Company; (this clearly shows that the entrymen deeded to Palmer, Rand and Long prior

to April 10th, 1905). All of the foregoing overt acts are outside of the three year period. The following acts relied upon are within the three-year period); (e) that on May 27th, 1905, Palmer deeded to the Barber Lumber Company; (f) on June 28th, 1905, Palmer deeded other lands to the Barber Lumber Company; (g) on January 2nd, 1906, Palmer deeded still other lands to the Barber Lumber Company; (h) on July 5th, 1906, and February 2nd, 1907, the defendants procured said deeds last above mentioned to be recorded; (i) on April 15th, 1905, defendants caused deed from Long to the Barber Lumber Company to be recorded; (j) on May 22nd, 1905, defendants induced Chapman to write Horace S. Rand a letter requesting him to execute a deed to the Barber Lumber Company of the lands deeded to him by the entrymen; (k) on July 27th, 1905, defendants accepted the delivery of a deed dated July 24th, 1905, from Rand to the Barber Lumber Company.

All of these acts are alleged to have been for the purpose of effectuating the *said* conspiracy, referring to the conspiracy set out in the charging part of the indictment which began September 1st, 1901, and under which the first overt act was performed September 20th, 1901, when John I. Wells filed his application to purchase. (26 R., 18 T.)

We thus have a conspiracy of September 1st, 1901, followed by an overt act on September 20th, 1901, upon which latter date the right of the government to prosecute for *that* conspiracy accrued.

If, therefore, the conspiracy or "hatching the plot" constitutes the offense, and the statute of

limitations begins to run with the inception of liability in conspiracy cases as it does on the prosecution of every crime, the statute began to run against the offense set out in this indictment on the 20th of September, 1901, and the following cases so hold:

United States v. Owen, 32 Fed. 534.
United States v. McCord, 72 Fed. 159.
Ex parte Black, 147 Fed. 832.
Ware v. United States, 154 Fed. 577.
Commonwealth v. Bartilson, 85 Pa. State, 482.
American Fire Ins. Co. v. State, 22 So. 99.
United States v. Black, (C. C. A. 7th Cir.) 160 Fed. 432.
United States v. Biggs, 157 Fed. 264.
United States v. Irvine, 98 U. S. 450.

In *United States v. Owen, supra*, Judge Deady said:

> "When was this crime committed? The conspiracy was formed July 1st, 1881, and the first act done by any of the conspirators was on December 27th, 1881. The crime was thus consummated * * on December 27th, 1881, more than five years prior to the institution of this prosecution, when an indictment might have been found. * * This being so, the limitation on the right to institute a prosecution therefor began to run at the same time."

In *United States v. McCord, supra*, Judge Bunn said:

> "In a criminal case under the United States Statutes it is incumbent upon the prosecution to show that an offense has been committed within the three years immediately preceding the finding

of the indictment. * * It is conceded that the indictment could have been found in March, 1891; that the conspiracy to defraud the government was then formed by the defendants and various overt acts performed intended to effectuate its objects. If this be so, it is difficult to see why the statute did not then begin to run. Otherwise you would have a different period of limitation in conspiracies than what you have in other offenses against the government. which could not have been the intention of the law."

In *ex parte Black*, *supra*, Judge Quarles held, in the plainest language, that the statute of limitations runs from the first overt act, because that is the time when the right of action accrues, and the statute of limitations always dates from that time. He then says:

"If the illicit scheme is continued and new overt acts to carry it out occurred within the period of limitations, the pleader should charge a new conspiracy".

In *United States v. Black*, 160 Fed., 432, the Court of Appeals of the Seventh Circuit say, in speaking of the statute of limitations;

"Under section 1044, R. S., the indictment must be found within three years next after such offense shall have been committed, so that both the fact and date of the overt act upon which the offense is charged are of the utmost materiality upon the present issue. If either of these (overt acts) can be accepted *as the inception of liability under the charge*

of conspiracy, then their date is within this period of limitation".

In *Ware v. United States*, *supra*, the question presented was not one of pleading, as in the case at bar, but arose on the admissibility of evidence. The indictment in that case charged the formation of the conspiracy within three years, with suitable allegations of overt acts to effectuate its purpose. On the trial, proof was offered of the existence of the same conspiracy and of overt acts to effectuate it, outside of the three year period. This evidence was admitted against the objection of defendant, and on appeal this ruling was assigned as error. In the opinion of the Court of Appeals by Judge Sanborn, it is said:

> "Proof of the formation by the defendant and others more than three years before the indictment of such a conspiracy as that charged in the indictment under which an overt act has been done prior to the three years is insufficient to sustain the charge of a conspiracy within the three years".

If such proof is insufficient to sustain a charge of conspiracy within the three years, it is submitted that allegations in an indictment of the same facts are insufficient to allege one.

> "But in connection with evidence aliunde of the existence of the same conspiracy and of the defendant's conscious participation therein within the three years, it is competent evidence for the consideration of the jury in determining the issue presented by the indictment. An overt act committed by one of the alleged conspirators within the

three years pursuant to a conspiracy between him and the defendant formed and followed by an overt act more than three years prior to the filing of the indictment, without the defendant's consent or *agreement* within the three years to the continued existence and to the execution of the conspiracy, is incompetent to establish its existence and his participation therein within the three years."

This clearly means that if a new conspiracy, or a new meeting of minds or agreement took place within three years, followed by an overt act, the guilty parties could be prosecuted, not for the old, but for the new agreement.

Judge Sanborn's meaning is made more plain by his comments on the rule established in *United States v. Britton*, 108 U. S. 199, as follows:

"So that there is a *locus penitentiae* after the performance of each overt act and a presumption of the innocence of the defendant, and if after the performance of the first overt act a defendant abandons the design of the conspiracy, and the prosecution of the conspiracy and of the first overt act becomes barred by the statute, the overt acts of other conspirators within the three years in the performance of the old conspiracy, without the conscious participation of the defendant, ought not to charge and cannot charge him with the offense, because they fail to evidence his intent to violate the law within the three years."

And also by the following:

"The same rules of evidence govern the

trial and the decision of the issue, whether or not the defendant consented or agreed within the three years to the existence of the conspiracy and the subsequent execution of its scheme, which control the trial of the issue, whether or not the conspiracy was originally formed. Evidence must be produced from which a jury may reasonably infer the joint assent of the minds of the defendant and of one or more other persons within the three years to the existence and the prosecution of the unlawful enterprise. *Until such evidence is produced, the acts and admission of one of the alleged conspirators are not admissible against any of the others*, etc."

If, therefore, the same rules of evidence govern the trial of the new conspiracy, the same rules of pleading must apply; and as the existence of the new conspiracy cannot be proven by overt acts of any conspirator, so the new conspiracy cannot be alleged by alleging acts of any conspirator. Applying this test to the indictment in the case at bar, and we find nothing alleged tending to show that these defendants ever entered into any agreement between themselves or with others, except on September 1st, 1901, and on September 20th, 1901 (the date of the first overt act), the presumption of innocence arose in their favor, and if that presumption is to be overcome, it must be by appropriate allegation that at a subsequent date they again conspired, and this allegation must be contained in the charging part of the indictment, and not by way of allegations of overt acts by alleged co-conspirators, for allegation of what alleged co-conspirators did cannot convict or charge

the defendants with making the original agreements and is not even admissible until such agreement is otherwise proven.

From the dissenting opinion of Judge Phillips in this case, it is apparent that the Court of Appeals were of the opinion that the statute of limitations began to run from the first overt act, for it is there said:

> "*It is conceded* that the commission of the first overt act in furtherance of the conspiracy agreement put into operation the three years statute of limitations".

We commend this dissenting opinion to this Court.

In *United States v. Biggs, supra*, the charging part of the indictment is in the exact language of the case at bar, as follows: that the defendants,

> "on the 25th day of August, 1899, and at the several times of the committing of the several overt acts hereinafter in this indictment mentioned, and continuously at all times between the said 25th day of August, in the year last aforesaid, and the day of the presenting of this indictment, unlawfully did conspire," etc.

It then set forth eight overt acts on eight different dates. Judge Lewis held this was a statement of eight several conspiracies, and the indictment was duplicitous; but, assuming that but one conspiracy was had, he said:

> "Assuming that the indictment does not charge several conspiracies as above indicated, but that it was one conspiracy, continous from the formation on August 25th, 1899, to the presenting of the in-

dictment, we come to consider the plea of the statute of limitations. The first overt act in furtherance of the conspiracy is charged as of August 25th, 1899; and it is insisted by the defendants that if the indictment charges but the one conspiracy, that on the commission of that overt act prosecution could have been had, and that therefore, the statute of limitations began to run as of that date. Against this it is answered that under the doctrine in the Ware case every overt act 'with conscious participation' by the defendants in the unlawful combination works a renewal of the conspiracy. This may be conceded to be the clear holding in that case, but it is evident that that conclusion was there reached on a consideration of the rules applicable to evidence and to the particular proof then in hand, which is a very different thing from the rules applicable to pleading in charging a criminal offense."

Following the rule announced in *United States v. Owen*, *supra*, the court then held that if but one conspiracy was charged, the statute of limitations began to run with the commission of the first overt act to effectuate its purpose, and was then barred.

The case of *Commonwealth v. Bartilson*, *supra*, has sometimes been quoted as holding that an indictment alleging the formation of a conspiracy outside of the three year period followed by an overt act within that period states an offense, but it does not so hold. In that case the court said:

"A conspiracy is averred to have been formed on

the 20th of December, 1874. This was more than two years prior to the finding of the bill, and upon this ground the court below quashed the count. It was strongly urged, however, that inasmuch as it was averred in said count that the defendants had, in 'pursuance and renewal of said conspiracy,' committed divers overt acts specifically described in said count, the date of one of which, at least, was within the statutory period, there was a continuance and renewal of the conspiracy from time to time, and the statute was thereby tolled. This is plausible, but unsound. The offense charged was the conspiracy. According to all the authorities, the conspiring is the essence of the charge, and if that be proved, the defendants may be guilty. * * According to the first count, the offense was complete the 20th of December, 1874. The overt acts set forth do not constitute the offense. An overt act may or may not be unlawful *per se*. It is because of its relation to an unlawful combination that it becomes obnoxious to the criminal law. The averment that the conspiracy was renewed from time to time does not meet the difficulty. If it proves anything, it proves too much. The renewal of a conspiracy means to begin it again; to recommence it; to repeat it. From this it is apparent that each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie. If, therefore, the overt acts were done or committed in renewal of the conspiracy of December

20th, 1874, they averred distinct offenses. It is a well settled rule of criminal pleading that distinct offenses cannot be joined in the same count. The difficulty in regard to this count arises merely from a mistake in pleading. *The date of the conspiracy should have been laid within the statutory period.* The Commonwealth must allege and prove a conspiracy within two years. If this cannot be done, the Commonwealth has no case. The pleader evidently felt the strain of this part of his case, so he introduced the averment that the overt acts were in 'renewal' of the original conspiracy. It was practically alleging an offense with a *continuendo*. It was an attempt to prove the existence of a crime within the statutory period by showing its commission outside of such a period, and that it had been continued down to a time within it. We think the indictment was properly quashed".

The case of *American Fire Ins. Co. v. State, supra*, has also been erroneously cited to the same proposition. In discussing the statute of limitations on demurrer to the indictment in that case the court said:

"If this indictment presented the original conspiracy as and when first formed, and that conspiracy was so originally formed two years before the finding of the indictment, the prosecution would, of course, be barred. Or, if treating this offense as composed of the original conspiracy, plus the first overt act done in pursuance of it and as completed when such overt act is done, then, if such overt act was done more than two years before the finding

of this indictment, in that case also, the prosecution would be barred."

In *Irvine v. United States, supra*, this precise question was presented, and squarely held that the statute of limitations begins to run from the moment the right to prosecute accrued. That was an indictment found against the defendant for wrongfully withholding pension money. There, as here, it was insisted, that so long as the money was withheld the crime was a continuing one. The trial court certified to this court the following questions: (a) Is the crime a continuous one down to the time of finding the indictment? (b) Does the statute of limitations constitute a bar to this prosecution, the indictment having been found September 15th, 1875 (five years after the first withholding)? The court said:

"There is in this but one offense. When it is committed, the party is guilty and is subject to criminal prosecution, and from that time also the statute of limitations applicable to the offense begins to run. * * The defendant pleads the statute of two years, a statute which was made for such a case as this: but the reply is, 'You have received the money; you have continued to withhold it these twenty years; every year, every month, every day was a withholding within the meaning of the statute'. We do not so construe the act. Whenever the act or series of acts necessary to constitute a criminal withholding of the money have transpired, the crime is complete, and from that date the

statute of limitations begins to run against the prosecution".

If this offense consists of the conspiracy alone, and not of the conspiracy plus an overt act done to effect the object of the conspiracy, as held by this court in *United States v. Britton*, 108 U. S. 204, *Dealy v. U. S.*, 152 U. S. 539, 546, *U. S. v. Hirsch*, 100 U. S. 33, *Bannon v. U. S.*, 156 U. S. 468, and by nearly every trial court that has been called upon to construe section 5440, there is no escape from the logical conclusion that the statute begins to run when the right to prosecute for the conspiracy accrued, namely on the commission of the first overt act to effect its purpose; and, on the other hand, if the statute does not begin to run from the first, but from any other act, it is because, and only because, it is the overt act and not the conspiring which constitutes the offense.

An examination of the cases cited by counsel will disclose that in every case the court has been compelled to take the ground that the commission of the overt act was the offense, or, was conclusive evidence of a new conspiracy, thus making the act of one co-conspirator conclusive evidence as against the others of the existence of an otherwise unproven or unalleged conspiracy.

In *United States v. Green*, 115 Fed. 343, the court held that if a scheme to defraud was entered into at a time so remote that the *prosecution for acts then done* was barred, it would still be punishable under the statute, if overt acts were committed within the period of limitations. It should be noted in this case, however,

that the conspiracy charged was within the statutory period.

In *United States v. Bradford*, 148 Fed. 413, the whole decision is predicated upon the following statement:

> "It is well and fully settled that the commission of an overt act is *per se* a rewnal of the conspiracy."

In *United States v. Brace*, 149 Fed. 874, it is said:

> "The more reasonable view is * * to regard the conspiracy as a continuing offense, so long as the parties thereto *continued to perform acts to effect its object.*"

In *United States v. Barber*, 157 Fed. 889, Judge Quarles, after holding that, on removal proceedings, all that was required of an indictment was to clearly indicate to accused the nature of the offense with which they are charged, then said:

> "There can be no doubt that the indictment as framed clearly indicates to the accused that they did 'unlawfully, falsely, fraudulently and corruptly, in furtherance of the alleged conspiracy and to carry out and effect the object thereof, perform certain overt acts, as for instance,'" etc.

In other words, Judge Quarles, on first impression, thought the defendants were charged with having performed an overt act, rather than having conspired. On rehearing, and on August 20th, 1908, Judge Quarles reversed himself, holding that the indictment then before him (which was not the one at bar) did not warrant defendants' removal, and ordered them discharged. This latter decision was never reported.

In *United States v. Raley*, 173 Fed. 159, the court

simply followed the decision of the court of appeals of that circuit in *Jones v. United States.*

In *Jones v. United States*, 162 Fed. 417, the Court of Appeals adopted the rule that each overt act constitutes a separate crime, and say:

> "Where the conspiracy contemplated various overt acts, * * * then each overt act gives a new, separate and distinct effect to the conspiracy, *and constitutes another crime*".

In *United States v. Breese*, 173 Fed. 402, Judge Newman correctly charged the jury that if the conspiracy charged, which was within the three-year period, was found to exist, it would not be material that the same conspiracy was originated or instituted outside the three-year period, but in that case the jury was not authorized to convict unless they found a meeting of the minds and an agreement entered into within the three-year period.

In *United States v. Bradford*, 152 Fed. 617 the Circuit Court of Appeals affirmed the ruling, and adopted the reasoning of the trial court in *United States v. Bradford*, 148 Fed. 413.

But, assuming that the statute does not begin to run until the performance of the last act to effectuate its purpose, and the decision of the lower court must be affirmed, because the acts alleged within a period of three years before April 14, 1905, when the indictment was filed, all occurred subsquent to the passing of the title from the United States to the lands in question

and after the purpose of the conspiracy had been consummated.

United States v. Black, 147 Fed. 832.

United States v. Black, 160 Fed. 432.

United States v. Biggs, 157 Fed. 264.

Lonabaugh v. United States, 179 Fed. 476; Advance Sheets, September 8th, 1910.

The indictment shows that the applications of the various entrymen to purchase the land in question were made between August 17th, 1901 (before the conspiracy is alleged to have been formed) and June 8th, 1904, and that the final proofs and final payments were made by the entrymen on various dates between November 13th, 1901, and September 20th, 1904. The Timber and Stone Act provides that upon payment of the purchase money etc., and the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon, so that by September 20th, 1904, every act which could have been done by any of the alleged conspirators had been performed, the patents issued, and the government had been defrauded, if at all, out of the title to and possession of its lands. Whether the guilty parties thereafter kept the land or conveyed it to their co-conpirators, or to others, was immaterial. The purpose of the conspiracy had been completed, and assuming that the statute then began to run, this case was barred on September 20th, 1907, seven months before the indictment was filed. On this question all the authorities agree.

In *Black v. United States*, 160 Fed., 432, the evidence established that final proofs and payments had been

made by all the entrymen who were alleged to have made entries as agents of the defendant more than three years before filing the indictment. The only act alleged or proven which occurred within the three-year period was the payment by the defendant to the entrymen of their stipulated compensation for assisting in the fraud. In discussing as to whether or not such payment could be deemed an act to effect the purpose of the conspiracy, the Circuit Court of Appeals for the Seventh Circuit, by Seaman, Circuit Judge, said:

> "Whatever may appear from the indictment as to the relation of these payments and of the payees to the alleged conspiracy, the proof of the fact and date of completion of entries and issuance of certificates of purchase establish beyond controversy that such payment (to the entrymen) was made, not as an act to effect the object of the conspiracy to defraud or to procure service to that end, but in settlement or payment for a pre-existing service or obligation; that such service was necessarily completed, and the obligation incurred prior to the date of the last certificate of purchase; so that neither form nor date of the payment (to the entrymen) so made, can serve as an overt act for charging conspiracy under section 5440, and thus evade the statute of limitations. * * The fact that final entries were made and purchase certified is presumptive, but not decisive, under the Timber and Stone Act, that all proceedings or service required to be performed to that end by either or all of the parties named as conspirators or defendants had been

entirely rendered when these certificates of purchase were issued, in so far as concerns the conspiracy to defraud the United States. * * Therefore, no occasion remained for further action on the part of either of the conspirators or other persons engaged to effect that object; and no opportunity was open to either conspirators for immunity under the *locus penitentiae* provision of section 5440. * * We are of opinion, therefore, that the violation of section 5440 was committed and completed before the certificates of purchase were issued, and that no overt act is charged within the period limited by section 1044, however the averments of the indictment are considered."

"The contention that the object of the conspiracy was not completed until a patent was issued and delivered is untenable, as we believe, in any view of the effect of the final entries and certificates of purchase thereof, for the two-fold reasons that violation of the statute in no way depends upon the success of the conspiracy and became complete (as before stated) when the final step was taken on the part of the conspirators. What course has been or may be adopted by the land office or other departments in reference to these entries, or in issuing or withholding the formal patents thereon is plainly immaterial under this indictment. The general doctrine with reference to public lands subject to entry appears to be settled that a tract ceases to be subject to the disposition of the United States when it is entered, paid for and so certified

by the land office, although no patent has been delivered. Cornelius v. Kessell, 128 U. S. 456; United States v. Schurz, 102 U. S., 378."

In *United States v. Black*, 147 Fed. , Judge Quarles, in an able opinion, points out the necessity of distinguishing carefully between acts tending to effectuate the conspiracy and those transactions between the conspirators themselves, which have no such effect, and held that the division of the spoils between the conspirators could not, under the law, be deemed an overt act.

In *United States v. Biggs*, 157 Fed. 264, the precise question here presented was passed upon by Judge Lewis. In that case the indictment alleged a conspiracy in the exact language of the indictment now before this court, followed by eight overt acts, seven of which were outside of the three-year period. The remaining act relied upon was the conveyance by William Barth (to whom the entrymen conveyed in trust for the corporation), to the corporation named in the charging part, for whose benefit the land was alleged to have been acquired. In passing upon the legal sufficiency of such a deed to toll the running of the statute of limitations, Judge Lewis said:

"It is contended for the government, and authorities have been cited for that purpose, that if the overt act is charged to have been to effect the object of the conspiracy, it becomes a question for the jury and not for the court to say whether such overt act was done to effect the unlawful purpose; but in those cases it does not affirmatively appear

from the charge that the overt act could not have had such an effect, while here, I think, it does appear that this overt act could not, by any possibility, have been done to effect the object of the conspiracy. Bearing in mind the offense charged, to wit: a conspiracy to defraud the United States, is it not apparent that the mere execution of the deed by Barth to the lands could have no such effect? I think it is".

In *Lansbaugh v. U. S.*, 179 Fed. 476, the Circuit Court of Appeals for the Eighth Circuit reversed the decision of the lower court, reported in 158 Fed. 314, under which latter decision the present indictment was drawn. The action was for conspiracy to defraud the United States by means of fraudulent entries of public lands. The fraud was to be effected by means of entries, apparently regular, but actually fraudulent, in that the entries were made for the use and benefit of a corporation. The entries actually were secured by false proofs; the entrymen then delivered to the corporation warranty deeds for the lands entered by them, with one exception, and he conveyed to an individual grantee designated by the defendants. Later, acting upon the false proofs submitted, patents were issued and still later delivered and recorded. After patent, the defendant caused the individual grantee to convey to the corporation, and all deeds to be recorded. The date of the several acts recited were such that no overt act occurred within three years of the finding of the indictment, unless the issuance of the patents, or some of the acts subsequently done by one or more of the

defendants, can be so regarded. On this state of facts the court said:

> "Of the issuance of the patents little need be said. It was not the act of one or more of the conspirators, but of the officers of the land department. * * And while it doubtless was induced by what the conspirators had done in giving to the entries the lawful appearance, when they really were fraudulent, the fact remains that all that was done by the conspirators in that connection occurred more than three years before the indictment was found."
>
> The subsequent acts (deeds to the corporation) are not open to the same objection, for they were the acts of one or more of the conspirators. But were they done to effect the object of the conspiracy; that is, to defraud the United States of the possession and title? This depends upon whether or not that object had been effected before these acts were done. If it had, the answer must be in the negative." * *

After citing and quoting from various cases, the court continued:

> "Applying these decisions to the present case, it is plain that the title passed from the United States when the patents were executed. * * And recalling what has been said about the possession and the right of possession, we think it also is plain that the object of the conspiracy was affected when the title passed from the United States, and there-

fore, what was done thereafter was not done to effect that object."

"But it is contended that the conspiracy was not limited to defrauding the United States of the lands, but included the transfer of them to the corporation, and that until both of these things were done the object of the conspiracy was not effected. * * Section 5440 does not interdict all conspiracies, but only those whose object is either 'to commit any offense against, or to defraud the United States in any manner,' and then only when one or more of the conspirators do some act to effect the object of the conspiracy. It is not enough that the conspiracy be directed to the attainment of some unlawful object, or to the attainment of some lawful object by unlawful means. It must be directed to the attainment of one of the objects specified. Nor is it enough that the overt act be directed to the attainment of some other object; it must be directed to the attainment of the object which brings the conspiracy within the interdiction; and when that object is attained, 'the object of the conspiracy' in the sense of the statute is effected. In this view of the statute the contention must fail. The conspiracy came within the interdiction because it had for one of its objects the defrauding of the United States, and that object was effected when, as a result of the deceit practiced upon the officers of the land department, the lands were patented to entrymen who were not entitled to them.

considering the antecedent agreement in pursuance of which the entries were secured."

By stipulation of the parties the decision and ruling made on defendants' plea to the fourth count shall be deemed to have been made on defendants' demurrer to the same count (71 R., 42 T.), and the defendants' demurrer to the fourth count was properly sustained;

First—because the charge that the defendants conspired on September 1st. 1901, "and at the time of the committing of the several overt acts hereinafter in this indictment set forth", followed by eighty-four alleged overt acts, must be deemed to be an allegation of that many several offenses, and is therefore duplicitous.

United States v. Biggs, 157 Fed. 264.

Second—none of the acts within or without the three year period can be said to be acts to effect the object of the conspiracy, as it is alleged in the charging part of the indictment. It charges that defendants,

> "on the first day of September, * * did unlawfully conspire, * * knowingly and corruptly to defraud the United States out of the use of and title to large tracts of timber lands, * * by unlawfully inducing persons to apply for and enter said lands, * * upon an understanding and agreement between defendants and said persons so to be induced to enter said lands, '*which agreement was to be had, made and entered into, * * prior to and at the time of the first application to enter said lands of said persons so to be procured*, 'that the title

should inure to defendants, who would point out the lands and pay the expense," etc.

It is well settled that the substance of the agreement alleged to constitute the unlawful conspiracy must be set out with particularity, including the means which the parties had decided upon to effect the purpose. *Pettibone v. United States*, 148 U. S. 197; *United States v. Hess*, 124 U. S. 483; *United States v. Crookshank*, 92 U. S. 542. In reponse to this rule the pleader has stated that, as a means of defrauding the United States, the conspirators agreed among themselves that they would induce various people to enter these lands, and that before each one made his first application they (the conspirators) *would* make an agreement with each entryman of the kind specified. This proposed agreement, which the conspirators had agreed between themselves was to be made with the entrymen was the *means* by which title was to be procured from the government.

Looking, now, to the overt acts alleged, and they must be such acts as the Court can see would tend to accomplish the desired result *by the alleged means:* Tested by this rule, and none of the alleged overt acts are sufficient. It is nowhere suggested that such *proposed* agreement was ever made with a single entryman, and it is not alleged that a single entryman procured his title from the government after having made such an arrangement with these defendants, or anyone else. The allegation relative to the overt acts, "that the defendants unlawfully induced and unlawfully procured," is not sufficient. What the pleader may have

thought to be unlawful may, or may not, have been so. But even if unlawful, it certainly could not be construed to be an allegation that they induced them to make the entries by first making the proposed agreement with them. The "means" alleged in this indictment was a *proposed* agreement to be made with each several entrymen *sometime in the future*. There is not a single overt act alleged even tending to show that any person charged as a conspirator made or attempted to make such proposed agreement with a single entryman. There is not, therefore, anything in this indictment to show that any of the alleged conspirators ever attempted to carry out the agreement it is alleged they made or attempted to procure government lands by the *unlawful means* which the charging part says was agreed upon. To illustrate, does the allegation that the defendants induced George S. Long to execute a deed to the Barber Lumber Company on April 10th, 1905 (33 R., 22 T.), indicate an intention to effectuate the purpose of the conspiracy to defraud *by the means alleged to have been agreed upon?* In other words, does it tend to show, or as a matter of law can it be said to have been calculated to show, an intention to make the proposed agreement with the entrymen? Do the allegations of overt acts, to the effect that the defendants induced the sixty-nine entrymen to make original entries, and thereafter make final proof on their several tracts, evidence or indicate an intention on the part of any alleged conspirator to defraud the government *by the means alleged in the indictment?*

It is not enough that the alleged overt acts might be said to effectuate the *purpose* of conspiracy, but such purpose must be effected by the *means* which the conspirators agreed upon, which, in this case, was the making of several contracts with each entryman prior to his original application to purchase.

This is the one means alleged by which the fraud was to be consummated, and yet we find no allegation that such contract was ever made, or that any of the conspirators ever took the first step looking to the making of such a contract.

It was suggested in the court below that the conspiracy here charged had for its purpose defrauding the United States by two separate methods. First, by depriving the Government of its title by illegal means, and second, by vesting title in the conspirators, and their corporation, to more than one hundred and sixty acres in evasion of the statutory prohibition.

This contention was based primarily upon the proposition that the rule announced in the Britton case, and ever since followed, that the offense is the conspiracy alone, is erroneous; that the offense is in making the entries, or in acquiring title under the Timber and Stone Act to more than one hundred and sixty acres; or, stated differently, that the offence is in *defrauding* the government, and not in *conspiring* to defraud it. From these premises it was ingeniously urged that every time a new fraud was commited, that is, every time a fraudulent entry was made, or one of the conspirators acquired more than one hundred and sixty

acres, a new offense was committed; and that under this view, the final deeds from Rand, Long and Palmer to the corporation were overt acts, tending to effectuate the purpose of defrauding by the second method mentioned. The following propositions sufficiently answer this contention in this case:

First. The indictment does not charge the defendants with conspiring to acquire more than one hundred and sixty acres, but "to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States".

Second. The defendants are charged with *conspiring*, and not with *defrauding* the United States in any manner whatever.

Third. The crime of conspiring to defraud cannot be converted into two crimes, because it was contemplated to defraud the government by two separate methods.

Fourth. The law does not prohibit any person, or association of persons, from acquiring more than one hundred and sixty acres from any person but the government itself.

Fifth. The question of whether or not the conveyances by Rand, Long and Palmer to the corporation were, or were not, such acts as would toll the statute of limitations, depends upon the relation of such acts to the unlawful agreement, which it is claimed constituted the conspiracy. That unlawful agreement, it is conceded, was formed September 1st, 1901, and was never modified or changed. Referring now to that

agreement, and we find that the conspirators agreed to nothing except that they would make an agreement with each entryman, *before he made his original application to purchase*. They had therefore done all that they agreed to do (if they did it at all), when the last application was filed, which was on June 8th, 1904. If they carried out the conspiracy and made the proposed agreement with this last entryman (which is not alleged), then is it not clear that the conspirators had done all that they agreed to do, and all that the original unlawful agreement contemplated. If anything further was done, it must have been pursuant to some new, modified or enlarged agreement, which is not alleged. Certainly, the execution of deeds by Rand, Long and Palmer, who were not even entrymen, subsequent to April 14th, 1905, cannot be said to have been acts done to carry out the original agreement of September 1st, 1901, which, by its very terms, was to expire when the last application was filed.

Sixth. But, even conceding that the purpose of this conspiracy was to vest in one person, or association of persons, more than one hundred and sixty acres in violation of the statutory limitation; and further conceding that the purpose of the conspiracy was not completed until that was done, and the decision of the lower court must be affirmed, because it affirmatively appears that prior to April 10th, 1905, the conspirators had procured all of these lands to be deeded from the entrymen to either Rand, Long or Palmer, and that as early at least as April 10th, 1905,

Rand, Long and Palmer each held title to several thousand acres of the land in question, (32, 33, R. 21, 22 T.) The indictment alleges that Long deeded to the corporation April 10th, 1905, and that prior to that date all of the entrymen had conveyed to Palmer, Rand or Long.

For the reasons herein stated, it is respectfully submitted that the writ of error should be dismissed; or if this Court has jurisdiction, that the ruling and decision of the trial court should be affirmed.

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IN THE

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OCTOBER TERM, 1939.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JAMES T. BARBER AND SUMNER G. MOON,
DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

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I.

This court has no jurisdiction.

a. Because the plea of defendants was filed as a plea in abatement by consent of all parties and of the court, and the court minutes show a mere dismissal of the cause, not a discharge of the defendants without day, as would be the case under a plea in bar.

b. For reasons stated in our original brief, a plea in abatement is the proper method of raising the question, in a

prosecution for conspiracy, that the indictment does not allege an overt act, which is a prerequisite to the right of the Government to prosecute. The plea is in the nature of one alleging that the action is prematurely brought.

* * *

II.

The only question before this court on this record, so far as the defendants' plea is concerned, is the sufficiency of such plea on the Government's demurrer thereto. By such demurrer the facts set up in the plea are admitted, and this presents the question as to whether or not such plea, as a matter of law, constitutes a defense. If so, plaintiff's demurrer thereto was properly overruled, and, because of plaintiff's failure to reply or plead over, judgment was properly entered, dismissing the cause.

For the sufficiency of such plea see:

People *vs.* Roe, 5 Park Crim. Rep.

Bishop's Directions and Forms, sec. 1046, note 2.

III.

Reversing the order of discussion of the next two propositions, as they are contained in the Supplemental Brief of plaintiff in error, we will herein discuss, first, the effect of an act committed within three years to effect the object of a conspiracy which was formed and followed by an overt act, outside the three-year period.

The commission of an overt act in furtherance of a conspiracy made complete, and subject to prosecution by the performance of an overt act, outside the three-year period, does not prevent the bar of the statute of limitations.

The Government contends "that the offense consists in the formation of the unlawful agreement, or, in other words, the hatching of the plot, and that an overt act renews the conspiracy whenever and wherever such overt act is committed, and all parties may be prosecuted for the new conspiracy at any time within the statutory period after the renewal."

The correctness of this proposition is the question now presented.

This contention concedes that the offense is the formation of the original unlawful agreement; it concedes that upon the performance of an act to effect the purposes of such unlawful agreement the right to prosecute arises and is complete, and that the statute of limitations then begins to run against such offense; but it is insisted that, as each original conspirator makes his co-conspirators his agents for all purposes relative to the conspiracy, he must be deemed to have authorized such agents to act for him for the purpose of renewing the original agreement whenever an alleged co-conspirator performs an act to effectuate its object.

In other words, the Government contends that each overt act performed by any one of the conspirators renews the offense as to all, and that an allegation of an overt act is equivalent to an allegation of a new or renewed meeting of the minds for unlawful purposes. This doctrine concedes the correctness of the reasoning of Judges Bunn, Deady, and Quarles, that the statute runs from the performance of the first overt act, but seeks to avoid the effect of such reasoning, by insisting that each overt act amounts, as a matter of law, to the making of a new contract or a new conspiracy.

upon which, again, the statute would begin to run from the next overt act, which would again constitute a new conspiracy, and so on, indefinitely.

It must be remembered that, as the issues are presented in this court, the demurrer and special plea of the defendants in error admits all that is properly pleaded in the indictment, and nothing more. Hence, to determine what the facts before this court are we must determine, as a question of pleading, what is properly pleaded.

The Government concedes that there is no direct allegation of the formation of a conspiracy at any time, except the original one of September 1, 1901, but urges that allegations of overt acts are the equivalent to an allegation of a new or renewed agreement.

The following propositions demonstrate the fallacy of this argument:

1. If each overt act is, *ipso facto,* a renewal of a former illegal agreement, then each such act is a new offense and the subject of separate prosecution, and should be so pleaded.

2. If an allegation of an overt act is equivalent to the allegation of a new agreement, then proof of such overt act would be proof of such new meeting of the minds, which would violate the universal rule that, until the conspiracy is otherwise shown, the acts of one conspirator are not admissible in evidence as against the others.

U. S. *vs.* Ware, 154 Fed., 590.
6th A. and E. Encyc. (2d ed.), 867-8, and notes.
2 Wharton Crim. Law, sec. 1406.
U. S. *vs.* Goldberg, 7 Biss., 175.
Logan *vs.* U. S., 144 U. S., 263.
Brown *vs.* U. S., 150 U. S., 93.
Clune *vs.* U. S., 159 U. S., 590.

3. It violates those other well-established rules of criminal pleading, that an indictment must charge the facts with sufficient particularity, without referring to the overt act, to

enable the court to determine the lawfulness or unlawfulness of the agreement; and that a person cannot be charged with a crime by alleging conclusions of law.

Britton *vs.* U. S., *supra.*
Cruikshank *vs.* U. S., 92 U. S., 542.
Ness *vs.* U. S., 124 U. S., 483.
Pettibone *vs.* U. S., 148 U. S., 203.

4. It violates the universal rule that the statute of limitations always begins to run with the inception of liability, for it concedes that the right of the Government to prosecute for the conspiracy here alleged accrued outside of the three-year period.

5. It is a universal rule that the bar of the statute of limitations is as complete a bar as the plea of *autrefois convict* or *autrefois acquit* (154 Fed., 587); and yet this doctrine, if followed, would permit defendants to be tried, prosecuted and punished for a conspiracy concededly barred by the statute, for counsel admit that there can be but one prosecution for one conspiracy, regardless of the number of times such conspiracy was renewed by the commission of overt acts.

6. As this indictment charges 84 different overt acts, at least several of which are claimed to be within the three-year period, it would be held under this doctrine to state that many renewals, and if defendants were put to trial upon such an indictment they would be tried for as many offenses as there are overt acts alleged to have been committed within the three-year period.

7. This doctrine amounts to this: That an overt act is *conclusive evidence* of a new agreement, and then attempts to charge a crime by charging the evidence of it.

8. But if we were to concede that each overt act is evidence of a new conspiracy the result in this case must be the

same, for the indictment industriously alleges that every act was done pursuant to *said conspiracy* of September 1, 1901, thus in terms negativing the formation of any new agreement.

9. It violates the rule that a presumption of innocence follows each overt act, and makes each such act serve both as conclusive evidence of the conspiracy and as an act to effectuate it.

10. In concluding this branch of the argument, we respectfully urge on this court the reasoning of Judge Phillips in his dissenting opinion in the case of Ware *vs.* U. S. (154 Fed., 580), in which he says, in substance: "Words are of little moment here. Whether it be deemed a new or a renewed agreement, it comprises but one offense; and under the plain language of section 1044 the right of the Government to prosecute for that offense accrues when the first act to effectuate it is performed, and the statute begins to run at that time."

11. Counsel likens a renewal of a conspiracy to giving a new note "to prevent the statute from running on an old one." To have such effect the new note must be given *before* and not *after* the statute has run.

IV.

If the doctrine that each overt act constitutes in law a renewal of the original agreement and a new offense, is correct, then this indictment is clearly duplicitous, as held by Judge Lewis in Biggs vs. United States, 157 Fed., 264, and defendants' demurrer to the indictment was properly sustained.

It must be remembered that in this case the ruling of the trial court on the special plea is to be deemed made on defendants' demurrer to the indictment. (See stipulation, 171 R., 42 T.)

V.

It was not error for the court to hold that the object of the conspiracy alleged in the indictment was accomplished when the title to the lands was divested out of the United States, nor was it error to hold that all the acts alleged to have been performed within the three years were not and could not be held to be acts to effect the object of the conspiracy charged.

The argument of counsel is, briefly, this: That the object of this conspiracy was to vest in the conspirators and their co-conspirators the title to more than 160 acres of land, in violation of the statute; that such object was not attained until such prohibited amount of land was so vested; and that, therefore, the deeds from the entrymen to Rand, Long, and Palmer, and from them to the corporation, were acts "to effect the object of the conspiracy." It is conceded by counsel that, after that "object" is attained, no subsequent act can be deemed an overt act.

The only question, therefore, on this branch of the case is: Were the deeds from Rand, Long, and Palmer to the corporation "acts to effect the object of the conspiracy" within the meaning of section 5440?

We contend that such deeds cannot be deemed overt acts for the following reasons:

1. This indictment, unlike that in the Biggs case and in the Lonabaugh case, does not charge that the object of the conspiracy was to evade the 160-acre limitation of the Timber and Stone Act, but simply charges the object to have been to defraud the United States "out of the possession, use of, and title to divers large tracts of timber lands of the United States" (describing them). It then proceeds to allege the *intent* of the conspirators to profit personally by

the fraud, and by means of a corporation to be organized, and "ultimately to obtain the transfer of the title to said lands to said corporation."

The *intent* or *purpose* of the conspirators in making the unlawful agreement is not material. It is the agreement to defraud which constitutes the prohibited conspiracy, and this court has repeatedly held that the agreement must be set out in full, so that the court can determine without reference to the overt acts whether or not it is unlawful (Britton *vs.* U. S., *supra*). It is not required that the *intent* or *purpose* which prompted the accused to become a criminal be set out, which would be mere surplusage.

Here it is charged that the defendants conspired "to defraud the United States out of the possession and use of and title to certain lands." That is the material charge, and that is followed by alleging the means to be employed, which were, in effect, to "induce the entrymen to make entries under agreements which are prohibited by the Timber and Stone Act."

We contend that the unnecessary and immaterial allegations of what the defendants intended or purposed doing with the lands, after the Government had been defrauded by the means agreed upon, cannot enlarge the scope of this conspiracy.

Counsel is in error in stating that this question was not raised in the court below. It was fully argued and passed upon. The memorandum opinion of the trial court is no part of this record, was not filed until long after this writ of error was issued, and was then filed in the lower court only because counsel for defendants requested the court specifically to pass upon the one question therein referred to. Many other questions (such as the duplicity of the indictment, its failure to state an offense, etc.) were argued on the demurrer to the indictment, which demurrer, as well as the special plea, was sustained.

2. But, conceding that the fraud here alleged consisted in evading the land laws of the Government, rather than defrauding it of its property, the result is the same.

Adopting counsel's construction of the indictment, and the conspiracy therein stated contemplated evading the land laws in two ways:

(*a*) By inducing entrymen to enter lands nominally for themselves, but actually for the conspirators; and

(*b*) By vesting in one corporation more than 160 acres. Clearly the first method was complete when the title passed and the provisions of the Timber and Stone Act (which prohibit any one to make entry for the benefit of another) had been successfully evaded. This being true, the object of the conspiracy—that is, to defraud the United States by evading its laws—had been then completed. The crime of conspiring to defraud cannot be made into two crimes because it was intended to defraud by two different methods. The conspiring, not defrauding, is the crime charged.

Again, it appears from the indictment that the entrymen deeded to Rand, Long, and Palmer (dates not given), and that *thereafter*, viz., on April 10, 1905, Long deeded to the corporation, thus showing that all the lands were vested in these three persons prior to April 10, 1905 (Record, pp. 32-3). The word "thereafter" clearly refers to what is alleged immediately preceding, namely, that the entrymen deeded to Long, Rand, and Palmer. If it does not, there is nothing to show when the deeds from the entrymen were executed, and this court cannot assume they were made within the three-year period.

3. But the whole question as to when the "object" of this conspiracy was consummated (assuming such object to have been to evade the 160-acre limitation) is settled in this case by the admission of counsel in his supplemental brief, as follows:

> "It is alleged that on April 10, 1905, the conspirators induced Long to execute a deed to the Barber Lumber Company. * * * This occurred three years and four days before the finding of this indictment, and it may be assumed that the deeds from the parties who conveyed the lands entered by them to Long were executed prior to that date."

It is thus conceded that several thousand acres of this land had been procured from the Government, and the title successfully vested in this corporation more than three years before this indictment was filed.

Did not this complete the object of the conspiracy?

Had not the 160-acre limitation of the Timber and Stone Act been at that time successfully evaded?

Would such an evasion have been more fully effected by acquiring additional lands?

Was not the "policy of the law" as fully thwarted when 5,000 acres had been vested in the corporation as when 50,000 acres had been so vested?

The theory of the Government now is that the fraud consisted in evading the law and violating the Governmental policy with reference to its lands, and not in causing pecuniary loss? If so, the extent of the acreage becomes unimportant. If this were a prosecution for *defrauding* the Government, each separate evasion might constitute a different offense. But this is a prosecution for *conspiring* to defraud. The question is: When was the contemplated fraud (evasion of the law) completed? We submit that the above admission and the allegations of the indictment which made such admission necessary fixed that date prior to April 10, 1905, and outside the three-year period.

4. Again, counsel concedes that merely recording deeds was not an overt act, and in his Supplementary Brief relies upon the deed from Palmer to the Barber Lumber Company of May 27, 1905; Palmer to the Barber Lumber Company

of June 28, 1905; deed from Palmer to the company of January 2, 1905, and the deed from Rand to the company of July 7, 1905. It will be noted that as to these specific acts the defendants in error, Barber and Moon, are not alleged to have taken any part. The allegation is that Albert E. Palmer, with the "knowledge and consent," etc., of James T. Barber, made the deeds in question. It is well settled that mere passive acquiescence in acts to effectuate an alleged conspiracy are not sufficient to charge the accused.

Lancaster *vs.* U. S., 44 Fed., 896.

5. For further reasons why the acts alleged within the three-year period cannot be held to be within the statute of limitations we respectfully refer to the cases cited in our original brief, page 26.

6. In concluding this branch of the case we desire to call attention again to the fact that there is no allegation in this indictment to the effect that a single entry was made pursuant to any unlawful agreement with the defendants, or that a single step was taken to make such agreement with a single entryman. In U. S. vs. Biggs (211 U. S., 507) the indictment in express terms charged that the purpose of the conspiracy was to evade the 160-acre limitation. The Attorney-General made the same argument in that case as is now made here. In that case this court held that failure to show an unlawful agreement made at or before the original application to purchase the land by the entryman was absolutely fatal, and that, in the absence of such allegation, subsequent acts showing the intention to vest in one person more than 160 acres did not state an offense. In this case the failure to allege the making of such an agreement was strictly in accordance with the facts.

In U. S. *vs.* Barber Lumber Co. (172 Fed., 948) the case of Keitel *vs.* U. S. and the Trinidad Coal Company case

were discussed and held inapplicable to the facts there proven and here alleged, and it was there held that the Government had failed to prove (as here it has failed to allege) that a single one of these entries was made pursuant to any agreement by which the title should inure to the benefit of these defendants, to the Barber Lumber Co., or to any one else.

For the reasons stated here and in our original brief we respectfully submit that the judgment appealed from should be affirmed.

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Attorney for Defendants in Error.

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A. A. FRASER,
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Of Counsel.

UNITED STATES *v.* BARBER.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

No. 444. Argued October 17, 18, 1910.—Decided January 3, 1911.

On an appeal under the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246, this court can only look to the judgment which was actually entered to determine what the action of the court below was, and not to any stipulation between the parties.

The designation of a plea does not change its essential nature, and the fact that the statute of limitations is designated as a plea in abatement and not a plea in bar, is untenable.

Even if this court has not jurisdiction under the act of March 2, 1907, of an appeal by the United States from a judgment sustaining a plea in abatement, it has jurisdiction if the plea sustained was in fact one in bar and based solely on the statute of limitations.

United States v. *Kissel*, 218 U. S. 601, followed to effect that a special plea in bar, based on the statute of limitations, to an indictment for conspiracy under § 5440, Rev. Stat., containing allegations of continuance of conspiracy to the date of filing, is not permissible; that defense must be made under the general issue.

THE facts are stated in the opinion.

Mr. Assistant Attorney General Fowler for the United States.

Mr. C. T. Bundy, with whom *Mr. James H. Hawley*, *Mr. A. A. Fraser*, *Mr. N. H. Clapp*, *Mr. A. E. McCartney*, *Mr. Joseph G. Dudley* and *Mr. Roy P. Wilcox* were on the brief, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On April 14, 1908, in the District Court of the United States for the District of Idaho, an indictment was re-

turned, which, in four counts, charged James T. Barber, Sumner G. Moon, Frank Martin and Albert E. Palmer with having violated the conspiracy section of the Revised Statutes, viz., § 5440. In the court below Frank Martin was dismissed from the indictment. Palmer made no appearance, presumably not having been arrested.

The final judgment, to reverse which this writ of error was sued out, is as follows:

"Now came the attorneys for the respective parties herein and thereupon the demurrer to the third count in the indictment herein is withdrawn by the defendants. The demurrer to the second count of the indictment is confessed by complainant, and it is ordered that the demurrer and plea in abatement to the first count of the indictment be and is hereby overruled and denied. It is further ordered that plea in abatement to the fourth count of the indictment be and is hereby sustained. Thereupon counsel for the Government moved and asked that the three first counts of the indictment in the above-entitled action be *nollied;* thereupon said motion was granted and the cause dismissed; all in accordance with the direction of Hon. Robert S. Bean, district judge, who heretofore heard and took under advisement said demurrer and plea in abatement."

As by this judgment the first, second and third counts of the indictment were dismissed by the court at the request of the United States, only the action of the court on the fourth count is open for consideration. It is for the purpose of correcting such action that the United States has prosecuted this writ, doing so upon the assumption that the judgment complained of is embraced within the third class of judgments which it is provided by the act of March 2, 1907, c. 2564, 34 Stat. 1246, may be removed to this court by writ of error, viz., a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy."

It is at once to be observed that the text of the judgment purports to sustain a plea in abatement to the fourth count of the indictment, and as the act of 1907 contains no provision authorizing the review of a judgment sustaining a plea in abatement, counsel for defendants in error now urge that we are without jurisdiction, because each of the pleas upon which the judgment dismissing the indictment was based was filed as a plea in abatement and was argued as such, and the judgment "is an abatement and dismissal of the pending cause only."

Briefly the state of the record on the subject is this. By the fourth count of the indictment it was charged as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said James T. Barber, Sumner G. Moon, Albert E. Palmer, and Frank Martin, in the State and District of Idaho, and within the jurisdiction of this court, heretofore, to wit, on the first day of September, in the year nineteen hundred and one, and at the time of the committing of the several overt acts hereinafter in this indictment set forth, and continuously at all times between said first day of September, in the year nineteen hundred and one, and the day of the presenting and filing of this indictment, did unlawfully conspire, combine, confederate, and agree together and with Frank Steunenberg, William Sweet, John Kinkaid, Louis M. Pritchard, John I. Wells, Patrick Downs, and divers other persons whose names are to the grand jurors unknown, knowingly, wickedly, falsely, and corruptly to defraud the United States of America out of the possession and use of and title to divers large tracts of timber lands of the United States situate in township six north, ranges four, five, six, seven, and eight east of the Boise meridian, township seven north, ranges four, five, six, seven, and eight east of the Boise meridian, and township eight north, range five east of the Boise meridian, in the county

of Boise, in the State of Idaho, and within the Boise, Idaho, land district of the United States, all of which lands were then and there public lands of the United States, with the intent and purpose unlawfully to obtain the title to said lands for the use, benefit, and profit of themselves and a certain corporation thereafter to be organized, to wit, the Barber Lumber Company, a corporation organized under the laws of the State of Wisconsin and doing business in the State of Idaho, with an office and agent at the city of Boise in said State, and ultimately to obtain the transfer of the title to said lands to said corporation. . . ."

The count next averred in substance that the object of the conspiracy was to be accomplished by unlawfully, etc., procuring a large number of persons to apply for and enter lands under the timber laws of the United States, for the use and benefit of the conspirators, upon the following understandings and agreements to be had with the proposed applicants prior to and at the time of the first application to enter the lands: *a*, that the title to lands to be applied for when acquired should enure to the use and benefit of the conspirators and the corporation; *b*, that the conspirators should select the land, furnish a description of the same to each applicant, prepare all necessary papers in connection with each application and represent the applicants before the Land Department; and, *c*, that the conspirators should advance any money needed to make a final payment, and without expense to the applicants should prepare the necessary conveyances to vest a record title to the land acquired in the conspirators and the corporation. The remainder of the count dealt with the overt acts charged to have been done in furtherance of the conspiracy. Some of the overt acts were alleged to have been committed upon dates more than three years before and others upon dates within three years of the filing of the indictment.

Barber and Moon demurred to the count, on the ground that it did not state facts sufficient to constitute an offense against or under the laws of the United States. The demurrer was argued, and at the close of the hearing leave was given "to file plea in abatement and motion to quash the indictment on account of duplicity." Each defendant thereupon filed what was denominated a "plea in abatement," which concluded with the prayer that the particular defendant might be "dismissed and discharged . . . from the premises" as to such count. The ground upon which it was insisted that the United States ought not to further prosecute was stated to be that the offense was barred "by the provisions of section 1044 of the Revised Statutes of the United States of America, in this, that more than three years have elapsed between the date of the commission of the alleged crime . . . and the date of the finding of the said indictment." Recitals were made in the plea tending to support the claim that the particular defendant was not a fugitive from justice at any time between the dates of the commission of the offense alleged and the finding of the indictment. The United States demurred to each of the pleas, and argument was had thereon. Subsequently, the judgment which we have heretofore excerpted was entered. On the same day the following stipulation was signed by counsel and filed with the papers in the case:

"The court, by order duly filed, having sustained the demurrer and plea in abatement of the defendants James T. Barber and Sumner G. Moon to the fourth count of the indictment heretofore returned and filed in the above-entitled action, it is hereby stipulated as follows:

"1st. That a nolle and order of dismissal shall, under the consent of the court, be entered in the above-entitled proceedings as to counts numbered one, two, and three thereof.

"2nd. That the demurrer and plea in abatement of the defendants to the fourth count of said indictment shall be heard and determined together, and that the order or ruling made on either shall be deemed to have been made on both."

In support of the contention that the pleas of the statute of limitations filed below should be regarded in this court, as they were designated below, as pleas in abatement, it is urged by counsel for defendants in error that the pleas presented the following propositions:

"First, conceding that the indictment alleged the *existence* of a conspiracy within three years, there was no allegation of any act within that time which could, by any possible interpretation be said to have been done to effectuate its purpose; and therefore the right to prosecute had not accrued; and second, that as all acts therein alleged which could be said to effectuate the purpose of the conspiracy were performed more than three years before filing the indictment, the government should proceed no further on this indictment."

The claim is then made "That in cases of conspiracy a plea in abatement is the proper method of raising the defense that the right to prosecute has not accrued, because no one of the conspirators has 'done an act to effectuate the object of the conspiracy.' "

Following this claim, it is urged that the defendants have by reason of the stipulation heretofore referred to, "the right to a formal judgment dismissing the action on demurrer for the reason that it does not state facts sufficient to constitute an offense." Upon this assumption it seems to be contended that the judgment should be regarded as entered on the demurrer, and as the judgment does not show that the trial court decided any question in passing on such demurrer which would give this court jurisdiction, the writ of error should be dismissed.

So far as the claim based upon the stipulation is con-

Where the record is not here, and the jurisdictional facts are admitted, and the order recited that the court was well advised in the premises, this court will not hold that the court to which the case was removed on petition of plaintiff in error himself did not acquire jurisdiction because the petition did not state all the jurisdictional facts required by the statute authorizing the removal.

While the repeal of a statute giving special jurisdiction to a court may operate to deprive that court of the jurisdiction so conferred, the mere enactment of a subsequent statute which obviates future application of the earlier statute does not amount to its repeal or affect jurisdiction already acquired.

The provisions of the Oklahoma enabling act of June 16, 1906, c. 3335, 34 Stat. 267, as amended March 4, 1907, c. 2911, 34 Stat. 1287, transferring criminal cases pending in the United States courts of the Indian Territory to the courts of Oklahoma, did not repeal the act of June 28, 1898, c. 517, 30 Stat. 511, or affect cases which had already been transferred under that act to the United States District Court for the Eastern District of Texas.

In this case *held* that it was not error for the trial court to refuse to allow the wife of one accused of murder to testify. *Logan* v. *United States*, 144 U. S. 263.

There was no error on the part of the trial court in denying a motion for a new trial based on affidavits of some of the jurors that they agreed to the verdict on the understanding between themselves and other jurors that the punishment of the degree found would be less than that imposed by the court. *Mattox* v. *United States*, 146 U. S. 140.

THE facts are stated in the opinion.

Mr. James G. Dudley for plaintiff in error:

Jurisdiction in a criminal case is never presumed, but must always be shown, is never waived by a defendant, and want of jurisdiction can be attacked at any stage of a criminal proceeding or even collaterally. *In re Neilson*, 131 U. S. 176; *United States* v. *Rogers*, 23 Fed. Rep. 662; *In re Mills*, 135 U. S. 270; *In re Graham*, 138 U. S. 451.

District Courts of the United States have no jurisdiction to try capital cases, no jurisdiction to try a person indicted for murder, charged to have been committed on land, and no power or jurisdiction to sentence a person for a capital

offense so committed, either to suffer death or life imprisonment. Section 563, Rev. Stat. The Circuit Courts of the United States have exclusive jurisdiction of all capital cases. Section 629, Rev. Stat., subd. 20.

The indictment in this case charges a crime (murder) punishable by death, § 5339, Rev. Stat., and the offense is no less capital, although the jury by their verdict found defendant guilty as charged "without capital punishment." *Fitzpatrick* v. *United States*, 178 U. S. 304; *Goodshot* v. *United States*, 104 Fed. Rep. 257.

The United States court in the Indian Territory had jurisdiction until taken away by the enabling act. Jurisdiction was taken away without saving and excepting cases pending by § 20 of the enabling act, as amended by the act of March 4, 1907.

When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute. *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 88; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473; *United States* v. *Barr*, 4 Sawy. 255; *United States* v. *Hague*, 22 Fed. Rep. 706; *United States* v. *Van Vliet*, 23 Fed. Rep. 35; *Manley* v. *Olney*, 32 Fed. Rep. 709; *Birdseye* v. *Sheffer*, 37 Fed. Rep. 825; *Aspley* v. *Murphy*, 50 Fed. Rep. 377; *Postal Tel. Cable Co.* v. *Southern R. R. Co.*, 89 Fed. Rep. 194; *Fairchild* v. *United States*, 91 Fed. Rep. 298; *Strong* v. *United States*, 93 Fed. Rep. 258; *Emblen* v. *Lincoln Land Co.*, 94 Fed. Rep. 713; 102 Fed. Rep. 562; *United States* v. *Jacobus*, 96 Fed. Rep. 262; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Cincinnati Brewing Co.* v. *Betteman*, 102 Fed. Rep. 17; *McClain* v. *Williams*, 10 S. Dak. 336; *Raush* v. *Mor-*

rison, 47 Indiana, 416; *Atty. Genl.* v. *Wharton*, 25 La. Ann. 32; *Waimsley* v. *Nichols*, 36 La. Ann. 801; *Church* v. *Weeks*, 38 Mo. App. 579; *Olcott* v. *Maclean*, 10 Hun, 282; *State* v. *Bank of Tennessee*, 3 Baxt. 409; *Texas Mexican R. R. Co.* v. *Jarvis*, 80 Texas, 464; *S. C.*, 15 S. W. Rep. 1089.

So if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it. *Sherman* v. *Grinnell*, 123 U. S. 679; *National Bank* v. *Peters*, 144 U. S. 570; *Gurnee* v. *Patrick County*, 137 U. S. 141; *United States* v. *Kelley*, 97 Fed. Rep. 461; *Sims* v. *Black Dog*, 9 Oklahoma, 671.

"When the jurisdiction of a cause depends upon a statute, the repeal of the statute takes away the jurisdiction, and causes pending at the time fall, unless saved by provision of the statute." *United States* v. *Boisdore*, 8 How. 113; *Baltimore & P. R. R. Co.* v. *Grant*, 98 U. S. 398; *United States* v. *Tymen*, 11 Wall. 88; *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 541; *McNulty* v. *Batty*, 10 How. 79; *Ex parte McCradle*, 7 Wall. 514; *Downes* v. *Bidwell*, 182 U. S. 248; *Gwin* v. *United States*, 184 U. S. 675; *Murphy* v. *Utter*, 186 U. S. 109; *Bird* v. *United States*, 187 U. S. 124; *Colt* v. *Young*, 2 Blatchf. 473.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. *Trenholm* v. *Gillard*, 101 U. S. 433; *Tex. Mex. R. R. Co.* v. *Jarvis*, 80 Texas, 464; *Larkin* v. *Safians*, 15 Fed. Rep. 153; *Vance* v. *Rankin*, 198 Illinois, 627; *Griffis* v. *Payne*, 22 Tex. Civ. App. 522; *Burlington* v. *Burlington Traction Co.*, 70 Vermont, 495; *Dulin* v. *Lillard*, 91 Virginia, 725.

The District Court of the United States for the Eastern District of Texas, to have had jurisdiction in this case by the order transferring the same, must not only have had jurisdiction of the offense, but must have obtained jurisdiction of the person of the defendant, by some means known to the law. *In re Johnson*, 167 U. S. 124; § 858,

Rev. Stat.; *Logan* v. *United States*, 144 U. S. 263, is not conclusive. See *Lucas* v. *Brooks*, 18 Wall. 436; Art. 775, Code of Crim. Proc.; Wilson's Statutes of Okla., 1903; Crim. Proc., 1232, § 5495; Snyder's Comp. Laws of Okla., 1909; Crim. Proc., 1399, § 6834; Laws of Okla., 1895, 201; Const. of Okla., Art. 24.

Under § 729, Rev. Stat., the trial of offenses punishable with death shall be had in the county where the offense was committed, where that can be done without great inconvenience.

A law intended by Congress specially for the benefit of members of the Choctaw and Chickasaw tribes, and for their protection against prejudice, should not operate as a snare and a delusion. *Texas &c. R. R. Co.* v. *Humble*, 181 U. S. 60.

The rule that jurors cannot be permitted to impeach their verdict, *Mattox* v. *United States*, 146 U. S. 140, does not apply here.

It is clear from the affidavits filed that the jury in this case discussed the punishment, and did not intend their verdict to carry a greater punishment than that for manslaughter. Unanimity is one of the essential features of trial by jury; it was so at the common law, and is preserved and protected by constitutional guarantee. *American Pub. Co.* v. *Fisher*, 166 U. S. 464; *Springfield* v. *Thomas*, 166 U. S. 707.

Mr. Assistant Attorney General Fowler for the United States:

The United States District Court for the Eastern District of Texas had jurisdiction to try this case, and it was not error for that court to overrule plaintiff in error's motion to remove the case to the District Court of Garvin County, State of Oklahoma. Section 4, act of March 1, 1895, c. 145, 28 Stat. 693; ch. 45, Mansfield's Digest General Laws of Arkansas; § 1, act of January 15, 1897, c. 29,

29 Stat. 487; act of March 3, 1885, c. 341, § 9, 23 Stat. 385; act of June 7, 1897, c. 3, 30 Stat. 62, pt. 6; agreement between Commission to the Five Civilized Tribes and the Choctaw and Chickasaw Nations of Indians, ratified by act of June 28, 1898, c. 517, 30 Stat. 495, 511, statutes relating to jurisdiction.

A United States court having jurisdiction over the Indian Territory was established by the act of March 31, 1889, c. 23, 25 Stat. 783, §§ 5, 17, 18; act of March 1, 1895, c. 145, 28 Stat. 693; act of June 28, 1898, c. 517, 30 Stat. § 29.

The admission of Oklahoma into the Union as a State did not abrogate the offense which plaintiff in error had committed, nor did it deprive the proper court of the power to proceed with the prosecution to a final judgment.

The statute creating the offense committed by plaintiff in error was not repealed by the admission of the State of Oklahoma, which embraced the territory wherein this crime was committed. *Holt* v. *United States*, 218 U. S. 245; *United States* v. *Baum*, 74 Fed. Rep. 43, 46; *Stevens* v. *Diamond*, 6 N. H. 330; Bishop, Stat. Crimes, § 182.

If the creation of Oklahoma into a State had the effect of repealing § 5339, Rev. Stat., under which this indictment was drawn, in so far as it applied to the territory embraced within said State, yet this offense was kept alive by § 13, Rev. Stat. *United States* v. *Reisinger*, 128 U. S. 398. The United States District Court at Paris, Texas, was the only court which, after the creation of the State of Oklahoma, had jurisdiction to try this case.

The authorities cited by plaintiff in error do not contradict this position.

There being no exception taken by plaintiff in error the order is not before this court on appeal, and it is not open to such collateral attack. *Voorhees* v. *United States Bank*, 10 Pet. 449, 472; *Grignon* v. *Astor*, 2 How. 318, 319, 338; *Harvey* v. *Tyler*, 2 Wall. 328, 342; *Applegate* v. *Lexington Mining Co.*, 117 U. S. 255, 270.

The change of venue was made on plaintiff in error's own motion, and he cannot now be heard to impeach its validity on the ground that the facts authorizing the transfer did not exist. *Murphy* v. *Massachusetts*, 177 U. S. 155; *Perteet* v. *The People*, 70 Illinois, 171, 178; *State* v. *McEvoy*, 68 Iowa, 355; *People* v. *Court Special Sessions*, 4 Hun, 441.

The failure to designate in the order that the case was removed to the District Court at Paris was immaterial, as the statute expressly directed that it was to that court alone it could be removed, and it was that court alone which was vested with jurisdiction to try the same.

Under the statutes directing the enrollment of the Indians, records thereof must be kept in the Interior Department, and the courts will take judicial knowledge of such records. *Knight* v. *United States Land Asso.*, 142 U. S. 161, 169.

The court did not err in refusing to permit Evelina Hendrix, the wife of plaintiff in error, to testify in his behalf. Section 858, Rev. Stat., has no application to criminal trials; rules of evidence in such cases, unless expressly modified by Congress, are those which existed when the judiciary act of 1789 was passed. *United States* v. *Reid*, 12 How. 361, 366; *Logan* v. *United States*, 144 U. S. 263, 298; *United States* v. *Black*, 1 Hask. 570; *United States* v. *Hawthorne*, 1 Dillon, 422; *United States* v. *Brown*, 1 Sawyer, 531; *United States* v. *Hall*, 53 Fed. Rep. 352. *Lucas* v. *Brooks*, 18 Wall. 436, 453, was a civil case, and does not apply.

Plaintiff in error is not entitled to a new trial for the reasons set forth in certain affidavits which it is claimed were made by members of the jury. *Mattox* v. *United States*, 146 U. S. 140, 149.

Whether a new trial should be granted being within the court's discretion is not reviewable by this court. *Henderson* v. *Moore*, 5 Cranch, 11, 12; *Marine Ins. Co.* v.

Young, 5 Cranch, 187, 191; *McLanahan* v. *Insurance Co.*, 1 Pet. 187; *United States* v. *Beaufort*, 3 Pet. 12, 32; *Mattox* v. *United States*, 146 U. S. 140, 147.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Hendrix was indicted in the United States court in the Indian Territory for the crime of murder, for killing one Roler W. Voss. On his motion the case was transferred for trial to the United States court for the Eastern District of Texas, at Paris, Texas. The order transferring the case recited that it was made on the motion of Hendrix, "the court being well advised in the premises."

On the fourth of March, 1909, in the District Court, he objected to the jurisdiction of the court on the ground that the crime was committed in the State of Oklahoma, and "that under the act of Congress known as the 'Enabling act,' passed June 16, 1906, all criminal cases pending in the United States court within the Indian Territory were transferred to the district courts of the State of Oklahoma and of the county of said State where the alleged offense is said to have been committed."

A motion was made to send the cause to such county, to the end that the offense "be tried in the county and State where alleged to have been committed, in pursuance of the Constitution of the United States and the statutes made in pursuance thereof."

The motion was supported by the affidavit of the attorney of Hendrix, which stated that he was instrumental in having the cause removed to Paris, Texas, on account of the prejudice of the presiding judge of the Southern District of the Indian Territory, and that "under the Federal statute permitting said removal to be made, the same was done by Will Hendrix on my advice and suggestion, especially for the reason before mentioned. . . ."

The motion was denied. Hendrix was convicted and sentenced to hard labor for life in the penitentiary of the United States at Atlanta, Georgia.

A motion for a new trial was made, stating as the grounds thereof certain rulings upon evidence, and the action of the court in denying the motion to transfer the case to Garvin County, Oklahoma. And the same grounds constitute the assignments of error in this court.

Another ground is urged in the argument. It is urged that the District Court at Paris, Texas, did not have jurisdiction of the person of Hendrix because, as it is contended, the order of the court changing the venue of the case directed it to be transmitted "to the United States court at Paris, Texas," and did not designate the District Court as required by the statute. "There were district and circuit courts," it is said, "for the Eastern District of Texas, at Paris, Texas, but no court by the name of the 'United States court.'" And it is asked, "to which of these courts was this case transferred?" The question is easily answered. The statute under which the change of venue was made provides "that whenever a member of the Choctaw and Chickasaw Nations is indicted for homicide, he may, within thirty days after such indictment . . . file . . . his affidavit that he cannot get a fair trial, . . . and it thereupon shall be the duty of the judge to order a change of venue in such case to the United States district court for the Western District of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the Eastern District of Texas, at Paris, Texas . . ." June 28, 1898, c. 517, 30 Stat. 511. Reading the order of the court changing the venue of the case in connection with the statute, the order is not uncertain. Besides, the record was transferred and filed in the District Court at Paris, Texas, and Hendrix was tried in that court. In other words, the case was removed to the only United States court at Paris, Texas, designated by the statute,

and tried in the only United States court there in which it could be tried.

It is further contended that such District Court had no jurisdiction of the person of Hendrix, because the order of removal did not recite "the jurisdictional facts or findings authorizing such change of venue," nor are such facts or findings shown by the record. That is, it is not shown that he was a member of the Choctaw and Chickasaw Nations. To both objections it might be immediately answered that a complete record of the case is not here. The affidavit upon which the order of removal was made is not here. It is not denied that an affidavit was filed as required by the statute, and it may be assumed that it was sufficient to justify the action of the court. It is admitted that Hendrix is an Indian and a member of the Choctaw and Chickasaw Nations. The motion for change of venue was made by him, and could only have been made by him, and the order recites that the court granted the motion, "being well advised in the premises." This means advised by Hendrix in the way provided by the statute. And it has indubitable confirmation in the affidavit of his attorney, filed in support of the motion to send the case back to Oklahoma. It stated that the motion for removal was made "under the Federal statute permitting said removal to be made."

The inference is palpable that the jurisdictional fact that Hendrix was an Indian was presented to the court and constituted its ground of action—action which, we may say, was imperatively required by the statute.

The next contention of Hendrix is that jurisdiction was taken from the District Court in Texas by § 20 of the act to enable the people of Oklahoma to form a constitution and a state government, as amended March 4, 1907. By that section it was provided that all causes, civil and criminal, pending in the United States courts of Oklahoma Territory, or in the United States courts in the Indian

Territory, at the time those Territories should become a State, not transferred to the United States Circuit Court or District Courts in the State of Oklahoma, should be proceeded with, held and determined by the courts of the State, with rights of appeal to the final appellate court of the State and to the Supreme Court of the United States. And it is provided that "all criminal cases pending in the United States courts in the Indian Territory not transferred to the United States circuit or district courts in the State of Oklahoma shall be prosecuted to a final determination in the state courts of Oklahoma under the law now in force in that Territory." March 4, 1907, Chap. 2911, 34 Stat. 1286.

The argument is that by certain acts of Congress, explained in *In re Johnson*, 167 U. S. 120, the United States courts in the Indian Territory were given jurisdiction of offences committed in the Territory against the laws of the United States, and that the laws which conferred jurisdiction on the United States courts held in Arkansas, Kansas and Texas outside of the limits of the Territory were repealed. But we have seen that by § 29 of the act of June 28, 1898, a change of venue of cases in the United States courts of the Territory could be invoked by a member of the Choctaw and Chickasaw Nations, and that under the statute the venue of the pending case was, on the motion of Hendrix, changed to the District Court at Paris, Texas. It is, however, contended that the power of the court to make the order "had been taken away and repealed by the act of Congress known as the 'Enabling act,' and the State of Oklahoma had been erected and the state courts had succeeded to the jurisdiction of the United States courts in the Indian Territory." The "Enabling act," it is urged, "makes no exception or provision saving cases pending in the United States court in the Indian Territory, nor any provision saving cases then pending in any of the United States courts" at Paris,

Texas, or in the Eastern District of Texas, on change of venue, and, therefore, the court had no jurisdiction to try Hendrix. To support the contention it is argued that when the jurisdiction of a cause depends upon a statute the repeal of the statute takes away the jurisdiction and causes pending at the time fall, unless saved by provision of the statute. Many cases are cited to support the proposition and other cases to sustain the view that, "if an act conferring jurisdiction is repealed, without reservation as to pending cases, they fall with it." The effect would have to be admitted if the imputed cause existed. The act of June 28, 1898, under which the change of venue was ordered, was not repealed. The conditions of its future application, of course, disappeared with the admission of the State into the Union, but what had been done before that time was not abrogated, nor was the statute repealed. It had performed its office as to the pending case, but even if we should consider it necessarily as a continuing power, not completely fulfilling its purpose by the transfer simply of a case from one court to another, we cannot regard it as having been repealed nor that jurisdiction had been taken from the District Court at Paris, Texas. The "Enabling act" provides only for the transfer of cases to the courts of Oklahoma which were pending in the District Court of the Territory of Oklahoma and in the United States courts of Indian Territory. That this case was so pending was the conception of counsel when the motion was made to transfer it to the District Court of Garvin County, Oklahoma, and the same conception is expressed in the argument. And it is necessary to meet the words of the enabling act, which embraced, as we have seen, only cases pending in the courts of Oklahoma and Indian Territories. The foundation of the conception seems to be that the venue of the case was not legally changed to the District Court at Paris, Texas, and that it was still pending in the United States court in

the Indian Territory when the enabling act was passed and was transferred by the act to the courts of the State. To this operation of the act we cannot assent. The act is explicit in its terms and provisions. It was careful in its accommodations for the new conditions—the change of the Territories into a State, and in the adjustments made necessary by the creation of new jurisdictions, state and Federal. There was no such necessity for cases transferred to other jurisdictions still adequate to dispose of them. The contention is therefore untenable.

It is assigned as error that the wife of Hendrix was not allowed to testify in his behalf to certain matters which, it is contended, were "vitally material to his defense." The ruling was not error. *Logan* v. *United States*, 144 U. S. 263.

On the motion for new trial affidavits of four jurors were offered, stating with some detail that they did not understand the legal effect of the verdict. Only one of the affidavits is in the record. The maker states that, by finding the defendant guilty, as charged in the indictment, without capital punishment, "he did not understand what the punishment would be on such a verdict, and agreed to it on the understanding that the punishment would only be two years in the penitentiary." He further states that he was in favor of a verdict for manslaughter, and would never had consented to the verdict had he thought or believed it "would carry with it a life penalty." The motion for new trial, as we have said, was denied. We see no error in the ruling. *Mattox* v. *United States*, 146 U. S. 140.

The other errors assigned are not pressed in the argument.

Judgment affirmed.

MR. JUSTICE HARLAN dissents.